183 (1)

Supreme Court, U.S.
FILED
MAR 2 - 2011
OFFICE OF THE CLERK

No. __-__101086

IN THE

United States Supreme Court

LIBERTY APPAREL COMPANY, INC. and ALBERT NIGRI,

Petitioners,

v.

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, and XUE JIN LIN,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Vano I. Haroutunian
(Counsel of Record)
Brett Nadler
Avraham Z. Cutler
BALLON STOLL BADER & NADLER, P.C.
729 Seventh Avenue, 17th Floor
New York, New York 10019
212-575-7900

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the correct test for joint employment under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") is set out in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), in *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003), or, in another circuit's test: and, consequently, is a manufacturer properly considered the joint employer of a subcontractor's employees where none of the factors for joint employment set out in *Bonnette* are present in said manufacturer-subcontractor relationship, but three of the six *Zheng* factors for joint employment exist.

2. Whether the Second Circuit Court of Appeals erred in affirming the District Court's decision that Petitioners were not entitled to have the ultimate legal determination of joint employment decided by the judge and, therefore, reviewing the issue of joint employment by clearly erroneous, not *de novo* review.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent company, no publicly held company owns 10% or more of its stock, and it does not own 10% of the stock in any company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF AUTHORITIES	vii
PETITION FOR CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
POINT I: THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE WIDESPREAD CIRCUIT CONFLICT AMONG THE COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW	6

Page

A. There is a Widespread Conflict Among The Circuits Regarding the Factors for Determining Joint Employment Under The FLSA..... 6

a. The First, Sixth and Ninth Circuit Courts of Appeal..... 7

b. The Fifth Circuit Court of Appeals..... 8

c. The Eleventh Circuit 9

d. The Second Circuit..... 10

e. The Fourth Circuit..... 11

B. The Instant Case is a Good Vehicle To Resolve The Circuit Split..... 13

C. Certiorari Should Be Granted Because a United States Court of Appeals has Decided an Important Question of Federal Law That has Not Been, But Should Be, Settled by This Court 17

POINT II: THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT WHETHER THE JUDGE SHOULD MAKE THE ULTIMATE LEGAL DETERMINATION OF JOINT EMPLOYMENT AND WHETHER THE APPELLATE COURT SHOULD REVIEW THE QUESTION OF JOINT EMPLOYMENT *DE NOVO*..... 20

Page

A. The Second Circuit 20

B. The Fifth Circuit 21

C. The Tenth Circuit 22

CONCLUSION 23

TABLE OF APPENDICES

	Page
Order of the United States Court of Appeals for the Second Circuit, No. 09-4890-cv, dated December 2, 2010	1a
Mandate and Summary Order of the United States Court of Appeals for the Second Circuit, Docket No. 09-4890-cv, dated August 10, 2010	3a
Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 09-4890-cv, dated August 10, 2010	10a
Memorandum and Order of the United States District Court for the Southern District of New York, No. 99 Civ. 9033 (RJS), decided May 30, 2008	20a
Opinion of the United States Court of Appeals for the Second Circuit, Docket No. 02-7826, decided December 30, 2003	52a
Opinion and Order of the United States District Court for the Southern District of New York, No. 99 Civ. 9033 (RCC), decided March 12, 2002	91a

TABLE OF AUTHORITIES

Cases: *Page(s)*

Alden v. Maine,
527 U.S. 706 (1999) 18

Auer v. Robbins,
519 U.S. 452 (1997) 18

Barfield v. N.Y. City Health & Hosps. Corp.,
537 F.3d 132 (2nd Cir. 2008) 11

Baystate Alternative Staffing v. Herman,
163 F.3d 668 (1st Cir. 1998) 8

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) ....*passim*

Brouwer v. Metropolitan Dade County,
139 F.3d 817 (11th Cir. 1998) 10

Castillo v. Givens,
704 F.2d 181 (5th Cir. 1983)..... 21, 22

Citicorp Indus. Credit v. Brock,
483 U.S. 27 (1987)..... 19

Dinkins v. Varsity Contractors,
2005 U.S. Dist. LEXIS 6732
(N.D.Ill. 2005)..... 6

Deras v. Verizon Md., Inc.,
2010 U.S. Dist. LEXIS 77249
(D.Md. 2010)..... 12

Falk v. Brennan,
414 U.S. 190 (1973) 18

Page(s)

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 18

Goldberg v. Whitaker House Cooperative, Inc.,
366 U.S. 28 (1961) 18

Hodgson v. Griffin & Brand, Inc.,
471 F.2d 235 (5th Cir. 1973) 9

Icicle Seafoods, Inc. v. Worthington,
475 U.S. 709 (1986) 19

Jacobson v. Comcast,
2010 U.S. Dist. LEXIS 102834
(D.Md. 2010) 12

Johnson v. Unified Gov't of Wyandotte County/ Kansas City, 371 F.3d 723
(10th Cir. 2004) 22, 23

Larson v. Leading Edge Outsourcing, Inc.,
2010 U.S. Dist. LEXIS 30129
(M.D.Tenn 2010) 8

Lepkowski v. Telatron Marketing Group,
2011 U.S. Dist. LEXIS 9388
(W.D.Pa. 2011) 6

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 18

Martin v. Bedell,
955 F.2d 1029 (5th Cir. 1992) 8

McLaughlin v. Richland Shoe Co.,
486 U.S. 128 (1988) 19

Page(s)

Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 2006 U.S. Dist. LEXIS 93896 (N.D. Ill. 2006) 7

Moreau v. Air France, 343 F.3d 1179 (9th Cir. 2003) 15

Moreau v. Klevenhagen, 508 U.S. 22 (1993) 19

Morgan v. Speak Easy, LLC, 625 F.Supp.2d 632 (N.D.Ill 2007) 7, 8

Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. 2004) 10

Powell v. United States Cartridge Co., 339 U.S. 497 (1950) 18

Rutherford v. McComb, 331 U.S. 722 (1947) 15, 17, 18

Schultz v. Capital International Security, 466 F.3d 298 (4th Cir. 2006) 11, 12

Tidd v. Adecco USA, Inc., 2010 U.S. Dist. LEXIS 24785 (D.Mass. 2010) 8

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 18

United States Department of Labor v. Cole Enterprises, 62 F.3d 775 (6th Cir. 1995) 8

Page(s)

Villarreal v. Woodman,
113 F.3d 202 (11th Cir. 1997) 9

Walling v. General Industries Co.,
330 U.S. 545 (1947) 18

Watson v. Drummond Co.,
436 F.3d 1310 (11th Cir. 2006) 10

Watson v. Graves,
909 F.2d 1549 (5th Cir. 1990) 8, 9

Welch v. Laney,
57 F.3d 1004 (11th Cir. 1995) 10

Williams v. Henagan,
595 F.3d 610 (5th Cir. 2010) 8, 9

Wirtz v. Lone Star Steel Co.,
405 F.2d 668 (5th Cir. 1968) 9, 10, 16

Wolf v. Coca-Cola Co.,
200 F.3d 1337 (11th Cir. 2000) 9

Zavala v. Wal-Mart Stores Inc.,
393 F.Supp.2d 295 (D.N.J. 2005) 7

Zhao v. Bebe Stores,
247 F. Supp. 2d 1154 (C.D.Ca.2003) 14

Zheng v. Liberty Apparel,
2002 U.S. Dist. LEXIS 4226
(S.D.N.Y. 2002) .....*passim*

Zheng v. Liberty Apparel,
355 F.3d 61 (2nd Cir. 2003).....*passim*

Page(s)

Zheng v. Liberty Apparel,
389 Fed. Appx. 63 (2nd Cir. 2010)..... 1, 15

Zheng v. Liberty Apparel,
556 F. Supp. 2d 284 (S.D.N.Y. 2008) .....*passim*

Zheng v. Liberty Apparel,
617 F.3d 182 (2nd Cir. 2010) 1, 21

Statutes

Fair Labor Standards Act,
29 U.S.C. §§ 201 *et seq*..... 1, 2

PETITION FOR CERTIORARI

Petitioners Liberty Apparel Company, Inc. ("Liberty") and Albert Nigri ("Nigri") (collectively, "Petitioners") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The following Orders and Opinions below have been published in official or unofficial reporters: (1) *Zheng v. Liberty Apparel*, 2002 U.S. Dist. LEXIS 4226 (S.D.N.Y. 2002), ("*Zheng I*") (granting Petitioners summary judgment because they did not employ respondents); (2) *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d Cir. 2003) ("*Zheng II*") (vacating *Zheng I* for using the wrong test for joint employment); (3) *Zheng v. Liberty Apparel*, 556 F. Supp. 2d 284 (S.D.N.Y. 2008) ("*Zheng III*") (denying Petitioners' motion for summary judgment under the joint employment test created in *Zheng II*); (4) *Zheng v. Liberty Apparel*, 617 F.3d 182 (2d Cir. 2010) ("*Zheng IV*") (upholding District Court's decision, *inter alia*, to send the ultimate issue of joint employment to the jury); (5) *Zheng v. Liberty Apparel*, 389 Fed. Appx. 63 (2d Cir. 2010) ("*Zheng V*") (affirming the finding of joint employment).

JURISDICTION

The judgments of the United States Court of Appeals for the Second Circuit Court were entered on August 10, 2010. The Second Circuit's Order

denying Petitioners' petition for panel rehearing, or, in the alternative, for rehearing *en banc* was entered on December 2, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.*, relevant to this petition are:

> 29 U.S.C. § 203—As used in this chapter . . .
>
> (d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e)(1) Except as provided in paragraphs (2), (3), and (4), the term 'employee' means any individual employed by an employer. . . .
>
> (g) 'Employ' includes to suffer or permit to work.

STATEMENT

Petitioner Liberty Apparel Company, Inc., at all times relevant to this action, designed, cut and sold ladies wear assembled by various independent garment factories in New York City with which Liberty contracted. Petitioner Albert Nigri was at all

times relevant to this action an officer and a 51% owner of Liberty.

One of the independent factories with which Liberty contracted was owned and operated by an individual named Steven Yam (with the help of his wife) (collectively, "the Yams"). Respondents are twenty-five garment workers who worked in Mr. Yam's factory. On April 7, 1999, Respondents arrived for work and discovered Mr. Yam had abandoned his factory and absconded with their wages. Unable to locate Mr. Yam and their wages, Respondents sued, among others, Liberty on a theory of joint employment. In addition to the wages Mr. Yam absconded, Respondents further claimed that Mr. Yam previously failed to pay them minimum wage and overtime in compliance with Federal and state law.

Prior to and at trial, Respondents admitted that the Yams, and not Petitioners, were responsible for hiring, firing, and paying Respondents. Respondents further admitted that the Yams, not Petitioners, assigned Respondents their specific tasks, set Respondents' schedules, engaged in full-day supervision of Respondents' activities and maintained Respondents' employment records. Respondents also admitted that they worked on garments for companies other than Liberty, that Mr. Yam's factory was not owned by Liberty, and that Respondents did not switch jobs to continue working on Liberty's garments. Respondents have never claimed that Petitioners and Mr. Yam had a relationship outside that of a contractual relationship,

or that Petitioners treated Mr. Yam's factory as a subsidiary by failing to enforce contractual penalties. Respondents admitted that Liberty's relationship with Mr. Yam's factory, as well as with Respondents themselves, was no different than the numerous other garment manufacturers who also contracted with Mr. Yam and his factory; nor were these relationships any different than the normal manufacturer/contractor relationship commonplace in the domestic garment manufacturing industry.

However, notwithstanding all of the foregoing admitted facts, Respondents nevertheless claimed that Petitioners were their joint employers because, according to Respondents: (i) Petitioners sent quality control inspectors to Mr. Yam's factory two to four days a week for up to three hours at a time; (ii) Respondents worked on Petitioners' garments 70-80% of the time; (iii) Respondents played an important role in Liberty's process of production; and, (iv) the general relationship between manufacturers and contractors in the garment industry was such that manufacturers controlled the contractors, and, by extension, the contractors' employees.

Initially, Petitioners prevailed on summary judgment because the District Court found that Petitioners did not employ Respondents. *See Zheng I.* In *Zheng* I, the District Court applied the same four-factor test used by many other circuits, which test considered whether Petitioners: (i) had the power to hire and fire Respondents; (ii) supervised

and controlled Respondents' work schedules and terms and conditions of employment; (iii) determined rate and method of payment; and (iv) maintained Respondents' employment records. The District Court concluded that none of these factors favored a finding that Petitioners were joint employers under the FLSA. Therefore, as a matter of law, Petitioners were entitled to summary judgment. *Id.*

Respondents appealed to the Second Circuit Court of Appeals. The Second Circuit vacated the District Court's decision, holding that the four-factor test the District Court applied was the wrong test for determining joint employment. *See Zheng II.* Instead, the Circuit Court in *Zheng II* articulated a new six-factor test for analyzing joint employment with instructions to the District Court regarding the application thereof on remand. On remand, the District Court found that three of the six factors set out by the Second Circuit could weigh in favor of joint employment, and therefore denied summary judgment. *See Zheng III.*

The case then proceeded to a jury trial. At the close of evidence and summations, over Petitioners' objection, the Court sent the ultimate legal determination whether Petitioners were Respondents' joint employer to the jury with a general verdict form. The jury found that Petitioners were Respondents' joint employers for at least part of the period claimed by Respondents and thereupon awarded Respondents two-thirds of their requested damages (apparently representing the proportion of time the

jury found Petitioners were Respondents' joint employer). The District Court rejected Petitioners' Rule 50 and 59 post-trial motions for largely the same reasons it denied Petitioners' summary judgment motion. The Second Circuit affirmed both the finding of joint employment and the District Court's decision to allow the jury to make the ultimate determination of law whether Petitioners employed the Respondents. On December 2, 2010, the Second Circuit denied Petitioners' petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

POINT I

THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE WIDESPREAD CIRCUIT CONFLICT AMONG THE COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW

A. There is a Widespread Conflict Among The Circuits Regarding the Factors for Determining Joint Employment Under The FLSA

"There is a split among the circuits as to the precise factors to consider in determining joint employment under the FLSA." *Dinkins v. Varsity Contractors*, 2005 U.S. Dist. LEXIS 6732, 23 (N.D.Ill. 2005) *See, also*, *Lepkowski v. Telatron Marketing Group*, 2011 U.S. Dist. LEXIS 9388 (W.D.Pa. 2011) ("There is no unanimity of opinion, however, as to the appropriate factors to be consid-

ered in analyzing whether a joint employment relationship exists"); *Morgan v. Speak Easy, LLC*, 625 F.Supp.2d 632, 649 (N.D.Ill 2007) ("The Seventh Circuit has not yet addressed the factors a court should consider in determining joint employment under the statute, and the circuits are currently split on the issue."); *Moldenhauer v. Tazewell-Pekin Consolidated Communications Center*, 2006 U.S. Dist. LEXIS 93896 at *23 (N.D. Ill. 2006) ("There is a split among the circuits regarding the precise factors a court should consider in determining joint employment under the FLSA."); *Zavala v. Wal-Mart Stores Inc.*, 393 F.Supp.2d 295 (D.N.J. 2005) ("Courts have not reached a uniform agreement on the relevant factors to be considered.")

While agreeing generally that joint employment is governed by the "economic realities" of the situation, the circuit courts have taken numerous and varied approaches to determining joint employment, as follows.

a. The First, Sixth and Ninth Circuit Courts of Appeal

In *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the Ninth Circuit employed a four-factor test for determining joint employment under the FLSA drawn from earlier cases, which considered: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment,

and (4) maintained employment records." *Id.*, at 1470.

The First Circuit, in *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998), adopted *Bonnette* as the proper test for determining joint employment. *Id.* at 675; *See also, Morgan*, 625 F.Supp.2d at 649 ("The First and Ninth Circuits have applied a four-factor test..."); *Tidd v. Adecco USA, Inc.*, 2010 U.S. Dist. LEXIS 24785, 4 (D.Mass. 2010).

The Sixth Circuit's decision in *United States Department of Labor v. Cole Enterprises*, 62 F.3d 775 (6th Cir. 1995) similarly adopts the four-factor *Bonnette* test. *See Larson v. Leading Edge Outsourcing, Inc.*, 2010 U.S. Dist. LEXIS 30129 (M.D.Tenn 2010) (citing *Cole Enterprises* as holding, "[t]he economic reality test considers the alleged employer's power to hire and fire the person, supervision and control of schedules and conditions of employment, determination of the rate and method of payment and the maintenance of employment records.")

b. The Fifth Circuit Court of Appeals

The Fifth Circuit considers the *Bonnette* factors to be the "four standard factors under the economic reality test." *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010); *See also Martin v. Bedell*, 955 F.2d 1029, fn. 9 (5th Cir. 1992); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990). However, *Williams* acknowledges that while the *Bonnette* four-factor test is the standard test, the Fifth Cir-

cuit applies other tests in different situations. *Williams* itself cites two such cases which determined whether a given worker was an employee or an independent contractor. Even in the "joint employer" context, several Fifth Circuit cases have used a five-factor test developed in *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968). *Wirtz* looked at:

> (1) Whether or not the employment takes place on the premises of the company?; (2) How much control does the company exert over the employees?; (3) Does the company have the power to fire, hire, or modify the employment condition of the employees?; (4) Do the employees perform a "specialty job" within the production line?; and (5) May the employee refuse to work for the company or work for others?

Id. at 670; *See also Hodgson v. Griffin & Brand, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973) (relying on *Wirtz*).

c. The Eleventh Circuit

Similar to the Fifth Circuit from which it was created, the Eleventh Circuit uses both the *Bonnette, supra,* and *Wirtz, supra,* tests. In *Villarreal v. Woodman*, 113 F.3d 202 (11th Cir. 1997), the Eleventh Circuit relied on *Bonnette* and *Watson* in utilizing the four factor test. *See also Wolf v. Coca-Cola Co.*, 200 F.3d 1337, fn. 4 (11th Cir. 2000) (citing *Villarreal* as an example of the "economic realities" test).

In *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995), the Eleventh Circuit used a modified version of the *Wirtz* joint employment test which looked at "whether or not the employment took place on the premises of the alleged employer; how much control did the alleged employer exert on the employees; and, did the alleged employer have the power to fire, hire, or modify the employment condition of the employees?" (internal quotation marks and brackets omitted). In *Watson v. Drummond Co.*, 436 F.3d 1310 (11th Cir. 2006), the Eleventh Circuit explained that *Welch* interpreted the "Equal Pay Act, an extension of the Fair Labor Standards Act (FLSA), incorporating its definition of an employer." *Drummond*, at 1316. *Drummond* found that the FLSA, Family Medical Leave Act (FMLA) and Employee Polygraph Protection Act (EPPA) all warranted using the same version of the economic realities test set forth in *Welch*. *Id.* at 1316; *See also Morrison v. Magic Carpet Aviation*, 383 F.3d 1253 (11th Cir. 2004) (applying the *Welch* test and FLSA caselaw to determine joint employment under the FLSA); *Brouwer v. Metropolitan Dade County*, 139 F.3d 817 (11th Cir. 1998) (identifying *Welch's* test as the appropriate test for joint employment).

d. The Second Circuit

In *Zheng II*, 355 F.3d 61 (2d Cir. 2003), the Second Circuit discussed two "competing" tests for determining joint employment under the FLSA. *Id.* at 65. The first test was the four-factor "formal control" test set forth in *Bonnette*. The second test was

a six-factor test created by *Zheng II*, which weighed:

> (1) whether Liberty's premises and equipment were used for the [Respondents'] work; (2) whether the [Yam's Factory] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which [Respondents] performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised [Respondents'] work; and (6) whether [Respondents] worked exclusively or predominantly for the Liberty Defendants.

Zheng II, 355 F.3d at 72; *See also Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008) (explaining that the *Bonnette* "formal control" and *Zheng II* "functional control" tests were two separate tests, each of which is sufficient to establish joint employment.)

e. The Fourth Circuit

The Fourth Circuit uses a unique hybrid of the *Zheng II* and *Bonnette* tests. Established in *Schultz v. Capital International Security*, 466 F.3d 298 (4th Cir. 2006), the Fourth Circuit first looked at the three examples of joint employment contained in the Department of Labor's regulations:

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Id. at 306 (quoting 29 C.F.R. § 791.2(b)). If the case does not fit within these three examples of joint employment, the Fourth Circuit then looks at both the *Zheng II* and *Bonnette* factors. *Id.* at fn. 2; *See also Jacobson v. Comcast*, 2010 U.S. Dist. LEXIS 102834 at fn.4 (D.Md. 2010) ("Therefore, this is an appropriate case for me to weigh the *Bonnette* and *Zheng* factors, as the Fourth Circuit instructs I should do where an employment relationship falls outside the regulatory examples."); *Deras v. Verizon Md., Inc.*, 2010 U.S. Dist. LEXIS 77249 (D.Md. 2010) (*Schultz* "explained that where the examples do not directly apply, courts should 'consider factors such as those listed in *Bonnette*, 704 F.2d at 1469-70, and *Zheng v. Liberty Apparel Co., Inc.*,

355 F.3d 61, 71-72 (2d Cir. 2003), in determining whether there are joint employers within the meaning of the Act and the regulation.'")

B. The Instant Case is a Good Vehicle To Resolve The Circuit Split

Petitioners' case presents a particularly good opportunity to resolve the joint employment circuit split because the two District Courts that previously evaluated this case reached conflicting results depending on application of the four-factor *Bonnette* test used by the First, Sixth and Ninth Circuits (and as the primary test for the Fifth Circuit, and as one of two tests used by the Eleventh Circuit), *see Zheng I;* or, application of the Second Circuit's six-factor test articulated in *Zheng II, see Zheng III.*

In *Zheng I*, the district court evaluated this case under the four-factor *Bonnette* test and found that no factor favored joint employment. *Zheng I* noted that even Respondents conceded that Petitioners did not hire, fire, pay or give assignments to them. With respect to the other factors, the District Court in *Zheng I* held:

> With respect to the second prong, whether Moving Defendants supervised and controlled employee work schedules or conditions of employment, the Court finds that Moving Defendants did not exercise such control to an extent that is relevant to this analysis. First, there is no suggestion in the

> record that Moving Defendants controlled employee work schedules by setting their hours or by deciding which days of the week the Plaintiffs were to work. Second, although the parties agree that Liberty's quality control person actually visited the factories to inspect the appearance and quality of the garments, there is no evidence of the fact that the quality control person influenced the Plaintiffs' work environment or conditions by requiring or prohibiting that certain amenities or fixtures be available.
>
> Similarly, the fact that Liberty paid Yam at piece rates, and that Yam, in turn, paid Plaintiffs at piece rates, does not support the conclusion that Liberty or Moving Defendants exercised control over the rate and method of payment. Moving Defendants neither directly paid Plaintiffs nor signed Plaintiffs' checks, which is a key question when making such determination. See *Herman*, 172 F.3d at 140. Further, there is no suggestion in the record that Moving Defendants directly maintained or were in any way involved in the maintenance of Plaintiffs' employment records.

Zheng I, at 20-21. *See also, Zhao v. Bebe Stores*, 247 F. Supp. 2d 1154 (C.D.Ca.2003) (reaching the same conclusion as *Zheng I* in a case with similar facts.) In contrast, following *Zheng II*, the District Court on remand evaluated joint employment under the six-factor *Zheng II* test and held that three of those

factors could be found to favor Respondents and therefore Petitioners were not entitled to summary judgment or judgment on the merits. *Zheng III*, at 289-95.

A second reason this case provides a good opportunity to resolve the circuit split is that it accentuates the subtle, but critical, differences between the various joint employment tests. For example, the four-factor *Bonnette* test looks to supervision of scheduling and conditions of employment, which as *Zheng I* pointed out, were not present in the case *sub judice*. Conversely, the six-factor *Zheng II* test allows quality control supervision unrelated to the terms and conditions of employment to favor a finding of joint employment. *See Zheng III*, at 293; *Zheng V*, at 65. This is an important difference because, as a matter of standard and acceptable (not to mention, necessary) business practice, most businesses that outsource use quality control supervisors to ensure their products are produced correctly and on time. *See, e.g., Moreau v. Air France*, 343 F.3d 1179 (9th Cir. 2003). Even more problematic, the garment industry is especially susceptible to findings of joint employment under the *Zheng II* test because virtually all garment companies that outsource production domestically use quality control supervisors, a fact admitted by both Respondents and their experts during the trial.

Similarly, although both are taken from the same part of *Rutherford v. McComb*, 331 U.S. 722 (1947), there is an essential difference between the third

factor of the six-factor *Zheng II* test—*i.e.*, "the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production, and the way similar factors have been used in other cases." *Zheng II*, at 72—and the factor set out in *Wirtz* which asks: "Do the employees perform a 'specialty job' within the production line?" 405 F.2d at 670. In the six-factor *Zheng II* test, this third factor includes a historical test which analyzes the origins of outsourcing in a particular industry over decades, a factor no other circuit considers. *Zheng II*, at 73-74. In effect, this factor results in certain industries (relevantly the garment industry, as explained below) to start with a strike against it, even where a valid business reason for the outsourcing presently exists.

There is no changing the New York City garment industry's history, namely that in the 1920s, many garment companies outsourced for the purpose of evading labor laws. *Zheng III*, at 291. That being said, under the six-factor *Zheng II* test, every garment company in the Second Circuit starts with two strikes against it (one for using quality control supervisors; a second for the historical malfeasance of bygone garment manufacturers). On the other hand, the very same garment company would have no strikes against it under the tests applied in another circuit.

A third reason this case is a good vehicle for resolving the circuit split is that all parties, including Respondents' experts, agreed that Liberty's relationship with the Yam's factory and Respon-

dents was no different than the other garment manufacturers who contracted with the Yam's factory, or typical to the garment industry in general. During both his opening and closing remarks to the jury, Respondents' attorney argued that *all* garment manufacturers are joint employers with the factory owners, and that Petitioners were not defying industry custom with some subterfuge. Therefore, the Second Circuit's decision in this context has dire consequences on all garment manufacturers and does not turn on factors peculiar to the present case.

C. Certiorari Should Be Granted Because a United States Court of Appeals has Decided an Important Question of Federal Law That has Not Been, But Should Be, Settled by This Court

Rule 10(c) of the Supreme Court Rules states that one factor considered in deciding whether to grant certiorari is whether a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." This Court has already held that the issue of how to define employee under the FLSA is an important federal issue worthy of its attention. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). ("We brought the case here because of the importance of the issues presented by the petition for certiorari to the administration of the Act."). The Court has repeatedly visited questions of whether a given set of "employers" were required to

pay their "employees" in accordance with the FLSA's minimum wage and overtime regulations. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (determining whether an employee fell within a statutory exemption to the FLSA); *Alden v. Maine*, 527 U.S. 706 (1999) (determining whether state employees could sue under the FLSA); *Auer v. Robbins*, 519 U.S. 452 (1997) (determining whether a group of police officers fit within a statutory exemption to the FLSA); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (determining whether religious organization was required to compensate certain "employees" in accordance with the FLSA); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (determining whether transit workers were employees protected by the FLSA); *Falk v. Brennan*, 414 U.S. 190 (1973) (holding defendants were joint employers of maintenance workers); *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (determining whether members of a cooperative were employees under the FLSA); *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) (determining whether plaintiffs were employees of the United States or a private contractor); *Rutherford, supra* (determining whether boners were employees or independent contractors of defendants); *Walling v. General Industries Co.*, 330 U.S. 545 (1947) (determining whether given employees were protected by the FLSA).

In addition to the above-cited cases, this Court has decided dozens of other cases under the FLSA

due to its importance and effect on American business. *See, e.g.*, *Moreau v. Klevenhagen*, 508 U.S. 22 (1993); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Citicorp Indus. Credit v. Brock*, 483 U.S. 27 (1987); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

In recent decades, "outsourcing has come to occupy an increasingly prominent place in the American economy." *Zheng II*, at 73 (quoting *The Outing of Outsourcing*, The Economist, Nov. 25, 1995, at 57 ("noting that outsourcing 'is part and parcel of the way American companies of all sizes do business'")). The diverse variety of joint employment cases cited above—which include manufacturing, health care, security services, retail and luxury services—illustrates the ubiquity of outsourcing.

That the definition of joint employer under the FLSA affects the definition of other important statutes which have modeled their definition of employment on the FLSA further supports this is an important federal question which should be settled by this Court. *See Drummond, supra* (discussing the Equal Pay Act's, EPPA's and FMLA's adoption of the FLSA's definition of joint employment.)

POINT II

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT WHETHER THE JUDGE SHOULD MAKE THE ULTIMATE LEGAL DETERMINATION OF JOINT EMPLOYMENT AND WHETHER THE APPELLATE COURT SHOULD REVIEW THE QUESTION OF JOINT EMPLOYMENT *DE NOVO*

According to the Second Circuit in *Zheng II*, to decide whether joint employment exists in a given situation under the FLSA, there are two types of determinations that need to be made. First, there are the facts underlying the situation, which should be made by the finder of fact and are subject to a clearly erroneous standard of review on appeal. *Zheng II*, at 76. Second, there is a question of whether the facts constitute employment under the FLSA's statutory definition. *Id.* There nevertheless is a dispute among the circuits whether the ultimate question of joint employment is a legal determination for the judge, or a factual question for the jury (or fact-finder). As a result of the foregoing, there is also uncertainty regarding the proper standard of review on appeal.

A. The Second Circuit

In the present case, Petitioners requested that the District Court have the jury resolve the underlying issues of fact, while reserving to itself the ultimate issue of joint employment, an issue of law. *See Zheng II*, at 76. The District Court rejected

Petitioners' request and allowed the jury to make the ultimate determination of whether Petitioners jointly employed Respondents. On appeal, the Second Circuit affirmed the District Court's decision, holding Petitioners were not entitled to a judicial determination of whether they fit within the statutory definition of employer or to *de novo* review of the determination they jointly employed Respondents. *Zheng IV*, at 186. ("Moreover, to the extent *Zheng II* contemplated *de novo* review of a joint employment determination, it did so only in the context of summary judgment, not a jury trial.")

B. The Fifth Circuit

In contrast, the Fifth Circuit Court of Appeals holds that the issue of joint employment should be made by the judge, not the jury. In *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), plaintiffs appealed a jury verdict finding "plaintiffs were not employees of defendant." *Id.*, at n.8. The Fifth Circuit declared "[t]his Court has repeatedly held that the ultimate conclusion that an individual is an 'employee' within the meaning of the FLSA is a legal determination rather than a factual one." *Id* at 185. In contrast to *Zheng IV's* attempt to differentiate between the legal standard for jury or judge determinations, *Castillo* held the same standard was equally applicable for both court determinations and jury trials. *Castillo*, at 186. ("Although the above-mentioned cases were tried to the Court rather than to a jury, there is no basis to differentiate between a jury and a nonjury case regarding

the status of an employee determination as legal or factual.") *Castillo* held it was error to send the issue of joint employment to the jury and reversed the lower court.

Castillo also held that the proper standard of review for the issue of joint employment in a jury trial was *de novo* review. *Castillo*, at 185-87. Rejecting the idea that the standard of review could vary, the *Castillo* Court stated "[a] plaintiff's decision to exercise his right to a jury trial does not change the standard of review to be applied by this Court." *Id.* at 187.

C. The Tenth Circuit

Similarly, the Tenth Circuit has held that the determination of employment under the FLSA was an issue for the jury and subject to *de novo* review. In *Johnson v. Unified Gov't of Wyandotte County/Kansas City*, 371 F.3d 723, 728 (10th Cir. 2004), the Tenth Circuit confronted what it called an "anomaly"—an FLSA case in which the parties stipulated to send the issue of joint employment to a jury instead of having a judge make that ultimate determination. *Id.* The Circuit held that, even in the context of a jury decision, "[a]s a rule, the ultimate question [of joint employment] is one of law." *Id.* The Circuit Court further noted that were it not for the parties' stipulation, the District Court should have made "the determination of the ultimate issue." *Id.* at 729. The Tenth Circuit held that the parties' stipulation to have the jury make the determination of joint employment was "invited

error." *Id.* Furthermore, *Johnson* held that the correct standard for reviewing employment under the FLSA is *de novo* review. *Id.* at 728-29.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant *certiorari*.

Respectfully Submitted,

Vano I. Haroutunian
(Counsel of Record)
Brett Nadler
Avraham Z. Cutler
BALLON STOLL BADER & NADLER, P.C.
729 Seventh Avenue, 17th Floor
New York, New York 10019
212-575-7900

APPENDIX

[OVAL STAMP:
UNITED STATES COURT OF APPEALS
FILED
DEC 02 2010
Catherine O'Hagan Wolfe
SECOND CIRCUIT]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of December, two thousand and ten.

09-4890-cv

Ling Nan Zheng, Ren Zhu Yang, Yun Zhen Huang, Wen Qin Lin, Sai Bing Wang, Ye Biao Yang, Rong Yun Zheng, Hui Fang Lin, Xiu Ying Zheng, Jin Ping Lin, Hui Ming Dong, Yu Bing Luo, Sau Chi Kwok, Sai Xian Tang, Yi Zhen Lin, Rui Fang Zhang, Mei Juan Yu, Mei Ying Li, Qin Fang Qiu, Yi Mei Lin, Mei Zhu Dong, Fung Lam, Xiu Zhu Ye, Sing Kei Lam, Xue Jin Lin,

Plaintiffs-Appellees,

v.

Liberty Apparel Company, Inc.,
Albert Nigri, Hagai Laniado,

Defendants-Cross-Claimants-Appellants,

Appellants having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[ROUND STAMP:
UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT]

/s/ [stamped signature]
CATHERINE O'HAGAN WOLFE

09-4890-cv
Zheng v. Liberty Apparel Co.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of August, two thousand ten.

PRESENT: DENNIS JACOBS,
Chief Judge,
BARRINGTON D. PARKER,
PETER W. HALL,
Circuit Judges.

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, XUE JIN LIN,

Plaintiffs-Appellees,

CUI ZHEN LIN,

Plaintiff,

–v.–

LIBERTY APPAREL COMPANY, INC.,
ALBERT NIGRI, HAGAI LANIADO,

Defendants-Cross-Claimants-Appellants,

NGON FONG YUEN, 88 FASHION INC.,
TOP FIVE SPORTSWEAR, INC.,
S.P.R. SPORTSWEAR, INC., 91 FASHION INC.,

Defendants,

LAI HUEN YAM, also known as Steven Yam, 998 FASHIONS INC., 103 FASHION INC.,

Defendants-Cross-Defendants.

FOR APPELLANT:

VANO I. HAROUTUNIAN (Will Levins, *on the brief*), Ballon Stoll Bader & Nadler, P.C., New York, New York.

FOR APPELLEES:

JAMES REIF (Anna Roberts *on the brief*), Gladstein, Reif & Meginniss, LLP, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Sullivan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED IN PART and VACATED AND REMANDED IN PART.**

Plaintiffs are a group of 25 Chinese garment workers in New York City's Chinatown. In 1999, they sued Liberty Apparel Company and its two principals (collectively, "the defendants"), and others, for violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, New York state analogs, and New York Labor Law § 345-a(1). Ultimately, a jury found Liberty Apparel and Albert Nigri liable

on the FLSA and New York state analog claims, and all three defendants liable on the § 345-a(1) claim; following resolution of various post-trial motions, the district court entered judgment accordingly.

The defendants now appeal that judgment. They argue principally that the district court improperly allowed the jury to determine whether Liberty was plaintiffs' joint employer, whereas instead the court itself should have resolved that issue. We address this issue in a separate opinion filed contemporaneously with this summary order.

The defendants also argue that: (1) the district court, having previously concluded that three of the factors involved in the joint employment inquiry favored the defendants as a matter of law, improperly refused to charge the jury accordingly; (2) the jury's verdict was not supported by sufficient evidence; and (3) New York Labor Law § 345-a(1) does not allow a private right of action.

[1] In denying summary judgment on remand, the district court held that as to three of the relevant factors there was no genuine dispute of fact, and that each favored the defendants as a matter of law. The defendants argue that the court erred in failing to instruct the jury accordingly.

Even assuming that the district court erred in this regard, vacatur is unwarranted. An improper jury instruction does not require a new trial if the error was harmless. *See* 28 U.S.C. § 2111; Fed. R. Civ. P. 61; *Gordon v. N.Y. City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000). "An error is harmless

only if the court is convinced that the error did not influence the jury's verdict." *Gordon*, 232 F.3d at 116. But "harmless error analysis does not require absolute certainty with respect to what effect the error had upon the verdict." *Bruneau ex rel Schofield v. S. Kortright Cent. School Dist.*, 163 F.3d 749, 760 (2d Cir. 1998). "[W]hen we are able to conclude that the verdict was not substantially influenced by the alleged error, then we may be quite confident the objecting party's rights were not prejudiced and may uphold the general verdict." *Id.*

Here, any error would be harmful only if there was a reasonable chance that the jury could have deemed any or all of factors one, two, and four to favor plaintiffs. On this record, that is implausible. The defendants admit that the plaintiffs conceded all three factors at trial, and the court's charge -- which we presume the jury followed, *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir. 1998) -- ensured that no improper considerations infected the jury's weighing of these factors.

[2] The defendants argue, as they did by way of an unsuccessful Rule 50 motion in the district court, that the jury's verdict was not supported by legally sufficient evidence. We will reverse only if, considering the evidence in the light most favorable to the plaintiffs and drawing all reasonable inferences in their favor, there was "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or there is such

an overwhelming amount of evidence in favor of [the defendants] that reasonable and fair minded jurors could not arrive at a verdict against [the defendants]." *Nimely v. City of N.Y.*, 414 F.3d 381, 390 (2d Cir. 2005) (internal quotation marks and brackets omitted).

For largely the same reasons stated by Judge Sullivan in his oral decision, we conclude that there was a legally sufficient basis for the verdict. A reasonable jury could have found that three of the relevant factors favored plaintiffs. First, the defendants do not dispute that a reasonable jury could have found that plaintiffs "performed a discrete line-job that was integral to Liberty's process of production." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (setting forth the relevant factors). Second, a reasonable jury could have concluded that the degree to which Liberty Apparel and its principals and agents supervised plaintiffs' work weighed in favor of plaintiffs given their testimony that representatives of Liberty Apparel supervised plaintiffs' work an average of three to four times per week for hours at a time and spoke directly to plaintiffs, on at least one occasion directing workers to stop work on another manufacturer's garments in order to begin work on Liberty's. Third, a jury could have reasonably concluded that plaintiffs worked predominantly for the defendants, given plaintiffs' testimony that 70 to 80 percent of their work was performed for Liberty.

Finally, the jury could infer that the defendants knew how much time it would take to do the work

Yam contracted to do, and that Yam would not pay plaintiffs more than he was paid by Liberty.

Thus, there was legally sufficient evidence for the jury's conclusion that the defendants exercised "functional control" over plaintiffs.

[3] The defendants argue that New York Labor Law § 345-a(1) provides no private right of action. At oral argument, the panel raised the prospect of certifying this important question to the New York Court of Appeals. Plaintiffs' counsel decided (in our view, sensibly) to abandon the § 345-a(1) claim rather than prolong further this eleven-year-old litigation. We therefore consider this claim abandoned, and we vacate the § 345-a(1) portion of the district court's judgment and remand for the district court to dismiss that claim and re-calculate the damages accordingly.

Finding no merit in the Liberty Defendants' remaining arguments, we hereby **AFFIRM IN PART** and **VACATE AND REMAND IN PART** the judgment of the district court. The mandate shall issue forthwith.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

09-4890-cv
Zheng v. Liberty Apparel Co.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: July 15, 2010 Decided: August 10, 2010)

Docket No. 09-4890-cv

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, XUE JIN LIN,

Plaintiffs-Appellees,

CUI ZHEN LIN,

Plaintiff,

—v.—

LIBERTY APPAREL COMPANY, INC., ALBERT NIGRI, HAGAI LANIADO,

Defendants-Cross-Claimants-Appellants,

NGON FONG YUEN, 88 FASHION INC.,
TOP FIVE SPORTSWEAR, INC.,
S.P.R. SPORTSWEAR, INC., 91 FASHION INC.,

Defendants,

LAI HUEN YAM, also known as Steven Yam,
998 FASHIONS INC., 103 FASHION INC.,

Defendants-Cross-Defendants.

Before: JACOBS, *Chief Judge*,
PARKER and HALL, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Sullivan, *J.*), after a jury verdict finding that appellants acted as a joint employer of the plaintiff garment workers, and are liable for unpaid and underpaid wages pursuant to the Fair Labor Standards Act, New York state analogs, and New York Labor Law § 345-a(1). We affirm. We consider the defendants' remaining arguments in a summary order filed contemporaneously with this opinion.

VANO I. HAROUTUNIAN (Will Levins, *on the brief*), Ballon Stoll Bader & Nadler, P.C., New York, New York, *for Appellants.*

JAMES REIF (Anna Roberts *on the brief*), Gladstein, Reif & Meginniss, LLP, New York, New York, *for Appellees.*

PER CURIAM:

Plaintiffs-appellees are 25 Chinese garment workers living and working in New York City's Chinatown. In 1999, they sued Liberty Apparel Company and its principals Albert Nigri and Hagai Laniado (collectively, "the Liberty Defendants"), and others, for violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, New York state analogs, *see* N.Y. Labor Law § 652(1); N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2, and New York Labor Law § 345-a(1). After a lengthy procedural history, the case went to a jury trial, and the principal issue was whether the Liberty Defendants were plaintiffs' "joint employer" for purposes of the FLSA and New York state analogs. The jury returned a verdict in favor of plaintiffs, and following resolution of various post-trial motions, the United States District Court for the Southern District of New York (Sullivan, *J.*) entered judgment accordingly.

The Liberty Defendants appeal that judgment. In this opinion, we consider their contention that the district court -- rather than the jury -- should have determined whether the Liberty Defendants were plaintiffs' joint employer. And on that issue, we affirm. We consider the Liberty Defendants' remaining arguments in a summary order filed contemporaneously with this opinion.

I

The full factual background of this case is set forth in Judge Casey's opinion in *Zheng v. Liberty Apparel Co.*, No. 99-Civ-9033, 2002 WL 398663, at *1-2 (S.D.N.Y. Mar. 13, 2002) ("*Zheng I*"). We recount only those facts necessary to resolve the single legal issue that requires an opinion.

Plaintiffs' direct employer was Lai Huen Yam, who owned and operated a factory where plaintiffs worked in New York City's Chinatown. In 1997, Yam entered into a business relationship with the Liberty Defendants. Liberty would deliver partially-finished clothes to Yam's factory, and plaintiffs would finish the clothes by sewing the fabrics together and adding buttons, labels, cuffs, and hems. The Liberty Defendants would regularly send quality control representatives to the Factory to supervise plaintiffs' work.

The dealings between Yam and the Liberty Defendants were non-exclusive; Yam's employees (including plaintiffs) did work for other manufacturers, and the Liberty Defendants subcontracted work to approximately 30-40 other factories. Nonetheless, plaintiffs testified that approximately 70 to 80 percent of their work was done on Liberty garments. The Liberty Defendants paid Yam by the piece (not the hour), and Yam paid plaintiffs the same way.

On average, each plaintiff worked more than 85 hours per week. When they were paid for their work -- which was not always -- they were paid at a

rate below the federal and state minimums, and they were never paid overtime.

On August 19, 1999, plaintiffs sued Yam and the Liberty Defendants for violations of the minimum wage and overtime provisions of the FLSA and New York state analogs; they also brought a claim pursuant to New York Labor Law § 345-a(1). Plaintiffs later voluntarily dismissed their claims against Yam, either because he could not be located or had ceased doing business.

The parties cross-moved for summary judgment, and by opinion and order dated March 13, 2002, the court granted the Liberty Defendants' motion in part and denied plaintiffs' motion in full. *Zheng I*, 2002 WL 398663, at *1. Applying the four-factor joint employment test articulated in *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984), the court held that the Liberty Defendants were not plaintiffs' joint employer within the meaning of the FLSA and analogous New York state laws. *Zheng I*, 2002 WL 398663, at *7.

Plaintiffs appealed, and this Court vacated and remanded on the ground that the district court applied the wrong test for determining joint employment. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 64 (2d Cir. 2003) ("*Zheng II*"). Extrapolating from Second Circuit and Supreme Court precedent, *Zheng II* identified six specific factors relevant to whether the Liberty Defendants were plaintiffs' joint employer:

> (1) whether Liberty's premises and equipment were used for the plaintiffs' work;

> (2) whether [Yam's Factory] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.

Id. at 72.

In language particularly relevant to this appeal, *Zheng II* identified "three types of determinations" that bear on the analysis of these factors: "First, there are historical findings of fact that underlie each of the relevant factors. Second, there are findings as to the existence and degree of each factor. Finally, there is the conclusion of law to be drawn from applying the factors, *i.e.*, whether an entity is a joint employer." *Id.* at 76. "The first two determinations . . . are findings of fact that must be accepted on appeal unless clearly erroneous." *Id.*; *see also id.* at 76 n.13 (noting "[t]he fact-intensive character of the joint employment inquiry"). "Only the last determination -- the ultimate decision as to whether a party is an employer -- is a legal conclusion that is reviewed *de novo*." *Id.* at 76. *Zheng II* also clarified that "[s]hould the District Court, on remand, deny summary judgment in favor of defen-

dants, it will be incumbent upon the Court to conduct a trial." *Id.* at 77.

On remand, the defendants again moved for summary judgment, and on May 23, 2008, Judge Sullivan denied that motion. *Zheng v. Liberty Apparel Co.*, 556 F. Supp.2d 284, 287 (S.D.N.Y. 2008) ("*Zheng III*"). The court determined that, while there was no genuine issue of fact that the first, second, and fourth *Zheng II* factors weighed in the Liberty Defendants' favor, there *was* a dispute of fact regarding factors three, five, and six. *Id.* at 289-95.

On February 11, 2009, after a two-and-a-half week trial, the jury found in plaintiffs' favor. The court denied the Liberty Defendants' post-verdict motions to set aside the verdict and for a new trial. By final judgment entered October 26, 2009, plaintiffs were awarded $556,566.76 in damages.

The Liberty Defendants now appeal that judgment. As to the FLSA and the analogous state law claims, they argue that (1) the district court improperly allowed the jury to determine the "ultimate legal question" whether the Liberty Defendants were plaintiffs' joint employer, whereas instead the court itself should have resolved that issue; (2) the district court refused to charge the jury that, as a matter of law, three of the six *Zheng II* factors weighed in the Liberty Defendants' favor (to some degree); and (3) as a matter of law, plaintiffs' evidence was insufficient to support the jury's finding of joint employment. As to the § 345-a(1) claim, the Liberty Defendants argue that (1) the statute does not authorize a private

right of action, and, alternatively, (2) whether it authorizes a private right of action raises a novel and complex issue of state law such that the district court should have declined to exercise supplemental jurisdiction over that claim, *see* 28 U.S.C. § 1367(c)(1).

This opinion is confined to an analysis of whether the district court properly allowed the jury to make the joint-employment determination. We conclude that it did. The Liberty Defendants' remaining arguments are considered in a summary order filed contemporaneously with this opinion.

II

In the context of a jury trial, the question whether a defendant is a plaintiffs' joint employer is a mixed question of law and fact. Such questions "involve[ ] the application of a legal standard to a particular set of facts." *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 437 (2d Cir. 1999) (internal quotation marks omitted). "FLSA claims typically involve complex mixed questions of fact and law . . . ." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981); *cf. Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 521 (2d Cir. 1998).

The jury's role was to apply the facts bearing on the multi-factor joint employment inquiry to the legal definition of joint employer, as that term had been (properly) defined by the district court in the jury charge. "[M]ixed questions [of law and fact] are 'especially well-suited for jury determination . . . .' "

Richardson, 180 F.3d at 437 (quoting *Mendell v. Greenberg*, 927 F.2d 667, 673 (2d Cir. 1990)); *see also Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 171 (2d Cir. 1998); *Simms v. Vill. of Albion, N.Y.*, 115 F.3d 1098, 1110 (2d Cir. 1997) ("A mixed question of fact and law may be submitted to the jury only if the jury is instructed as to the applicable legal standards.").

In the Liberty Defendants' view, the district court should have provided a special verdict form so that the jury could detail its factual findings regarding the various joint employment factors, and so that the district court could then have applied those findings to make the final determination as to joint employment. But such a rule would distort the jury's proper role, described above, of applying law to fact. Moreover, requiring the use of a special verdict form would be anomalous in the law, *cf.* Fed. R. Civ. P. 49(a); *Kirsch*, 148 F.3d at 171; 9B C. Wright & A. Miller, *Federal Practice & Procedure* § 2505 ("Wright & Miller"); and appellate courts rarely -- if ever -- vacate for failure to use a special verdict form, *see Skidmore v. Balt. & O.R. Co.*, 167 F.2d 54, 67 (2d Cir. 1948) ("[W]e cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, although we deem such verdict usually preferable to the opaque general verdict."); Wright & Miller § 2505 ("[A]s numerous courts have held, as evidenced by the many cases cited in the note below, the exercise of th[e trial court's discretion in using a general rather than a

special verdict form] is not likely to be overturned on appeal.").

The Liberty Defendants' reliance on language from *Zheng II* is misplaced. That decision recognized that the joint employment question is a mixed one of law and fact: "Finally, there is the conclusion of law *to be drawn from applying the factors*, i.e., whether an entity is a joint employer." *Zheng II*, 355 F.3d at 76 (emphasis added); *cf. id.* at 76 n.13 (noting "[t]he fact-intensive character of the joint employment inquiry"). Moreover, to the extent *Zheng II* contemplated *de novo* review of a joint employment determination, it did so only in the context of summary judgment, not a jury trial. *De novo* review of a jury's joint employment determination would necessitate use of a special verdict -- which, as we explained above, we do not require -- and would cause the appellate court to tease apart the interwoven elements of facts and law, a project that would raise serious Seventh Amendment concerns, *cf. Castillo v. Givens*, 704 F.2d 181, 199 (5th Cir. 1983) (Higginbotham, *J.*, concurring) -- if it could even be done.

CONCLUSION

For the foregoing reasons, we hold that the district court properly submitted the joint employment issue to the jury. The judgment of the district court is affirmed, subject to the partial vacatur and remand required by the companion summary order. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No 99 Civ. 9033 (RJS)
May 29, 2008
556 F. Supp. 2d 284;
2008 U.S. Dist. LEXIS 43510

May 30, 2008 Decided **May 30, 2008, Filed**

LING NAN ZHENG, *et al.*,

Plaintiffs,

versus

LIBERTY APPAREL COMPANY, INC.,
ALBERT NIGRI, HAGAI LANIADO,

Defendants.

OPINION
MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, *District Judge*:

Plaintiffs bring this action against Liberty Apparel Company, Inc. ("Liberty Apparel"), and its principals, Albert Nigri and Hagai Laniado, alleging that defendants failed to pay plaintiffs wages allegedly owed to them under federal and New

York State wage and overtime compensation [*287] provisions. On March 13, 2002, the Honorable Richard C. Casey, District Judge, granted defendants' motion for summary judgment against plaintiffs' federal claims, and declined to exercise supplemental jurisdiction over plaintiffs' state law claims. On February 13, 2004, the Second Circuit vacated Judge Casey's decision and remanded the action to this Court for further proceedings. On October 6, 2004, defendants renewed their motion for summary judgment plaintiffs' remaining claims.[1]

At a conference on May 23, 2008, the Court issued an oral order denying defendants' renewed motion for summary judgment in its entirety. The Court now sets forth its reasons for that decision.

I. BACKGROUND

The Court presumes the parties' familiarity with the facts and procedural history of this action as set forth, at length, in Judge Casey's summary judgment decision, *Zheng v. Liberty Apparel*, No. 99 Civ. 9033 (RCC), 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *1 (S.D.N.Y. Mar. 13, 2002) (hereinafter, "*Zheng I*"), and the Second Circuit's decision, *see Zheng v. Liberty Apparel*, 355 F.3d 61, 65 (2d Cir. 2003) (hereinafter, "*Zheng II*").

---

[1] This case was reassigned from Judge Casey to the Honorable Kenneth M. Karas, District Judge, on May 21, 2007. The case was then [**2] reassigned to the undersigned on September 4, 2007.

Plaintiffs are twenty-six, non-English-speaking garment workers who worked in a factory at 103 Broadway in New York's Chinatown. Liberty Apparel is a garment manufacturer, and Nigri and Laniado are its two principals.

Plaintiffs were employed by several corporations (the "Contractor Corporations") that entered into contracts with Liberty Apparel to perform "assembly work" on Liberty Apparel garments. In this action, plaintiffs allege that Liberty Apparel, its principals, and the Contractor Corporations served as "joint employers" [**3] of plaintiffs, and, therefore, that they are jointly liable for their failure to pay plaintiffs wages and overtime compensation allegedly owed to plaintiffs under state and federal law.[2] Specifically, plaintiffs assert claims under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 216(b)*, and *New York Labor Law § 663(1)* based upon defendants' alleged violations of (1) wage provisions, to wit, *FLSA § 206* and Labor Law *§ 652(1)*; (2) overtime compensation provisions, to wit, *FLSA § 207* and *12 NYCRR § 142-2.2*; and (3) *New York Labor Law § 345-a*, which prohibits manufacturers from entering into garment labor contracts where they knew, or should have known, that the contractor failed to comply with the provisions of New York law that govern the payment of wages.[3] *See*

---

[2] On July 15, 2002, plaintiffs dismissed their claims against the Contractor Corporations.

[3] Following *Zheng I*, plaintiffs did not appeal the dismissal of their claims under *N.Y. Lab. Law § 191* and *N.Y. Lab. Law § 193*, nor did they appeal Judge Casey's denial of

Compl. P 2; *Zheng v. Liberty Apparel*, 355 F.3d 61, 65 (2d Cir. 2003).

II. STANDARD OF REVIEW

The standards for summary judgment are well-settled. Pursuant to *Federal Rule of Civil Procedure 56(c)*, a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Bronx Household of* [*288] *Faith v. Bd. of Educ. of City of N.Y.*, 492 F.3d 89, 96 (2d Cir. 2007). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004); *see Anderson*, 477 U.S. at 248 (holding that summary judgment is unwarranted if "the [**5] evidence is such that a reasonable jury could

---

plaintiffs' cross-motion for summary judgment. *See Zheng II*, 355 F.3d 66 n.1. Therefore, this Court [**4] need not address plaintiffs' *§ 191* and *§ 193* claims or their cross-motion for summary judgment.

return a verdict for the nonmoving party"); *Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99, 103 (2d Cir. 2007). As such, "[a] dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) (internal citation omitted); *accord Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007).

III. DISCUSSION

Defendants seek summary judgment on the following grounds: First, in regard to plaintiffs' claims under FLSA and its New York statutory analogues, *Labor Law § 652(1)* and *NYCRR § 142-2.2*, defendants assert that there is no genuine issue as to whether Liberty Apparel was a joint employer of plaintiffs within the meaning of FLSA. Second, in regard to plaintiffs' *§ 345-a* claims, defendants assert that there is no genuine issue as to whether defendants knew or should have known that the contractors that hired plaintiffs violated New York State wage and overtime laws. Finally, defendants assert that there is no genuine issue as to whether the individual defendants Nigri and Laniado should [**6] be held responsible for the alleged violations of FLSA and New York law.

For the following reasons, the Court denies defendants' motion in its entirety, and finds, as to each of plaintiffs' claims, that there are genuine issues of material fact that cannot be resolved by this Court at the summary judgment stage.

A. Plaintiffs' FLSA Claims

In regard to defendants' motion against plaintiffs' FLSA claims, the critical issue is whether plaintiffs have proffered sufficient evidence to demonstrate a genuine issue as to whether Liberty Apparel was a "joint employer" of plaintiffs within the meaning of the FLSA, even where Liberty Apparel did not directly employ plaintiffs. *See Zheng II*, 355 F.3d at 70 ("[A]n entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them."). In *Zheng II*, the Second Circuit instructed this Court to "determine whether the Liberty Defendants should be deemed to have been the plaintiffs' joint employer" based on six factors that it believed "the court [would] find illuminating in these circumstances," although the Court "is also free to consider any other factors it deems relevant to [**7] its assessment of the economic realities" underlying the parties' relationship. *Id.* at 71-72. When the six factors outlined in *Zheng II* are found to "weigh in plaintiffs' favor, they indicate that an entity has functional control over workers even in the absence of . . . formal control," and therefore demonstrate that Liberty Apparel was a joint employer of plaintiffs. *Id.* at 72.

Moreover, the Second Circuit noted the "fact-intensive character of the joint employment inquiry," *id.* at 76 n.13, and acknowledged that its decision set a high bar for defendants to obtain summary judgment against plaintiffs' FLSA claims: "In order to grant summary judgment for

[*289] defendants, the District Court would have to conclude that, even where both the historical facts and the relevant factors are interpreted in the light most favorable to plaintiffs, defendants are still entitled to judgment as a matter of law. . . . Should the District Court, on remand, deny summary judgment in favor of defendants, it will be incumbent upon the Court to conduct a trial." *Id.* at 76-77.

For the following reasons, the Court finds that, drawing all reasonable inferences in plaintiffs' favor, three of the six *Zheng II* factors [**8] weigh in plaintiffs' favor, and, therefore, summary judgment is inappropriate as to plaintiffs' FLSA claims.

1. First Factor

The first *Zheng II* factor is "whether Liberty's premises and equipment were used for the plaintiffs' work." *Zheng II*, 355 F.3d at 72. The Court finds that there is no genuine issue as to whether Liberty Apparel's "premises and equipment" were used for plaintiffs' work. Therefore, this factor does not weigh in favor of finding that Liberty Apparel was a joint employer of plaintiffs.

It is undisputed that plaintiffs did not perform work at the "premises" of Liberty Apparel. (*See* Pls.' 56.1 P 17; Defs.' 56.1 P 17.) However, plaintiffs assert that they effectively used Liberty Apparel's "equipment" in assembling garments. In support, plaintiffs have presented evidence in the record demonstrating that at least some of the items necessary to the garment production engaged in by plaintiffs was provided by Liberty Apparel. Specifically, plaintiffs point to the deposition testi-

mony of Nigri, wherein he testified that Liberty Apparel supplied several items to the Contractor Corporations that were necessary to preparing the finished products, to wit: (1) the cut fabric from [**9] which the garments would be assembled (*see* Nigri Dep. at 99-102); (2) materials such as "labels," "zipper[s]," "buttons," and "shoulder pads" to affix to the assembled garments (*id.*); and (3) diagrams and written specifications for the assemblers to follow in constructing the garments (*see id.* at 120-25).

However, plaintiffs have failed to present *any* authority in support of the proposition that the term "equipment," as it was used in *Zheng II*, should be construed so broadly as to include the raw materials that are the subject of the contracting relationship. Rather, the weight of authority favors a more narrow view of the term. For instance, in *Chen v. Street Beat Sportswear, Inc.*, 364 F. Supp. 2d 269, 280 (E.D.N.Y. 2005), the Honorable I Leo Glasser, District Judge, noted that the defendant-manufacturer had "provided the contractors with all materials, including the cut garment, the trimming, the hanger, the 'poly bag and labels" as well as "provided assembly instructions." Nevertheless, the court found that the plaintiffs used "separate premises and equipment" in performing their work.

Similarly, in *Rutherford Food Corp. v. McComb* -- the case from which the Second Circuit in *Zheng* [**10] *II* "derived" this factor, *see Zheng II*, 355 F.3d at 72 -- the Supreme Court, in finding that the plaintiffs used the defendant's "equipment,"

focused solely upon the fact that the defendant provided the plaintiff-butchers with a room for cutting meat as well as barrels for storing the meat, and did not rely upon the fact that the defendant's also provided the plaintiffs with the raw material -- *i.e.*, uncut meat -- on which they performed their work. 331 U.S. 722, 725-26, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)

Moreover, the Court notes that plaintiffs' broad interpretation of the term "equipment" -- that is, as including the raw materials on which plaintiffs perform their work -- would weigh in favor of a joint employer finding in nearly every contracting [*290] case involving the garment industry, including a significant number of cases where the parties are engaged in a "legitimate subcontracting relationship." *Zheng II*, 355 F.3d at 72. Therefore, the Court finds that plaintiffs were not using Liberty Apparel's "premises and equipment" and, therefore, this factor does not weigh in favor of finding that Liberty Apparel was a joint employer of plaintiffs.

2. Second Factor

The second *Zheng II* factor is "whether the Contractor [**11] Corporations had a business that could or did shift as a unit from one putative joint employer to another." *Zheng II*, 355 F.3d at 72. Here, it is undisputed that the Contractor Corporations' business could shift from one manufacturer to another. (*See* May 13 Tr. at 20 ("[T]he contractor, we [plaintiffs] would acknowledge, at least had the opportunity and the ability to shift from one

manufacturer to the other. We don't dispute that.").) Therefore, the Court finds that this factor does not support a finding that Liberty Apparel was a joint employer of plaintiffs.

In regard to the first two factors, the Court notes that, in *Zheng II,* the Second Circuit specifically cautioned that these two factors were only "a starting point in uncovering the economic realities of a business relationship," and, by themselves, were not dispositive on the joint employer issue. *See Zheng II*, 355 F.3d at 72. Thus, the Court proceeds to address the remaining four factors, three of which weigh in favor of a joint employer finding.

3. Third Factor

The third *Zheng II* factor concerns "the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production." *Zheng II*, 355 F.3d at 72. [**12] For the following reasons, the Court finds that there is a genuine issue of material fact as to whether plaintiffs performed a "discrete line-job" that was "integral to Liberty's process of production." *Id.* Therefore, drawing all reasonable inferences in plaintiffs' favor, this factor weighs in favor of finding that plaintiffs were "employees" of Liberty Apparel.

In *Zheng II,* the Second Circuit observed that it could not offer "firm guidance as to how to distinguish work that 'in its essence, follows the usual path of an employee,' from work that can be outsourced without attracting increased scrutiny under the FLSA." 355 F.3d at 73 (quoting *Rutherford*, 331 U.S. at 729). Nevertheless, the Second

Circuit outlined a continuum where, at one end, individuals performed work that "requires minimal training or equipment, and which constitutes an essential step in the producer's integrated manufacturing process," thereby signaling an employer-employee relationship, and, at the other end, individuals performed "work that is not part of an integrated production unit, that is not performed on a predictable schedule, and that requires specialized skills or expensive technology," thereby signaling [**13] a legitimate subcontracting or outsourcing relationship. *Zheng II*, 355 F.3d at 73.

Moreover, in conducting this analysis, the Second Circuit instructed courts to consider "both industry custom and historical practice." *Id.* Specifically, "if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws." *Id.* at 74.

Here, plaintiffs have proffered sufficient evidence that they were engaged in labor that was "more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor," *Rutherford*, 331 U.S. at 730, [*291] so as to demonstrate the existence of a genuine issue of material fact precluding summary judgment on this factor. Specifically, plaintiffs have proffered sufficient evidence -- that is, sufficient to create a triable issue of fact -- demonstrating that: (1) the work performed by plaintiffs was manual work --

namely, sewing -- that required little to no skill or training (*see* Vanegas Decl. P 9(a)); (2) [**14] plaintiffs' work was an "essential step" in defendants' manufacturing process (*see* Defs.' 56.1 P 13); (3) the assembly of garments was a straightforward task that could have been performed "in-house" by Liberty Apparel, *see id.* P 9(b); and (4) plaintiffs performed work according to Liberty Apparel's instructions and under the supervision of defendants' representatives (*see id.;* Nigri Dep. at 99-102, 120-125; Lin Decl. P 3.).

Moreover, in regard to the relevant "industry custom and historical practice," *Zheng II*, 355 F.3d at 73, plaintiffs have offered sufficient evidence to allow a reasonable jury to find in their favor on the issue of whether the "contracting device" used by defendants in this case "has developed in response to and as a means to avoid applicable labor laws," and therefore may be construed as an attempt to evade regulation. *Zheng II*, 355 F.3d at 74. [**15] Specifically, plaintiffs have satisfied their burden at this stage of the case by presenting declarations and reports from two expert witnesses regarding the purported development and modern use of the contracting device at issue -- namely, the practice of manufacturers contracting out assembly work to garment contractors.

First, plaintiff's expert Luis Vanegas opines that, on the basis of his approximately fourteen years of experience as an investigator of the garment industry for the United States Department of Labor, the "principal factor" that leads modern manufacturers to use garment contractors "is not an economic one

but, rather, is the notion that the [manufacturer] will not be subject to liability . . . for wage and hour violations [to] which the workers hired by the contractor . . . are subjected." (Vanegas Decl. P 9(p).)

Second, plaintiff's expert Dr. Richard A. Greenwald, an Assistant Professor of History at the United States Merchant Marine Academy, opines, on the basis of his knowledge of the history of the garment industry, that, "[b]y the mid-1920s," approximately "three-quarters" of garment manufacturers "contracted out the assembly phase of production to middlemen who [**16] were the direct employers of the workers who assembled the garments," and that "[t]his contracting out of the assembly phase of garment production has remained a fixed feature of the garment industry since the 1920s." (Greenwald Decl. PP 6-8.) Moreover, Dr. Greenwald concludes that, historically, the "impetus" for this practice was manufacturers' desire to "escape" responsibility "for the wages and working conditions of the workers . . . hired by a contractor to perform that part of the garment production." (*Id.* P 8.)

Accordingly, the Court finds that there is a genuine dispute as to the facts underlying this factor -- namely, whether plaintiffs' work was "integral" to Liberty Apparel's process of production as well as whether the "contracting device" at issue "has developed in response to and as a means to avoid applicable labor laws," and therefore may be construed as an attempt to evade regulation. *Zheng II*, 355 F.3d at 73; *see Chen*, 364 F. Supp. 2d at 281 (finding that the plaintiffs' work was "integral" to the

defendant's manufacturing process where, *inter alia*, "plaintiffs' sewing work in the assembly phase of production constituted a vital part of defendant's production of garments [**17] and functioned essentially as [defendant's] own sewing and pressing unit, merely located a few blocks away [*292] from the main plant.") (internal quotation marks and citation omitted). Thus, construing the evidence in the light most favorable to plaintiffs, and drawing all reasonable inferences in their favor, the Court finds that this factor weighs in favor of a finding of joint employment. *See Zheng II*, 355 F.3d at 76.

Defendants argue that the proffered submissions from plaintiffs' experts are both "patently unreliable" and "irrelevant," and, therefore, should not be considered by the Court in resolving defendants' motion for summary judgment. (Defs.' Reply Mem. at 6-7.) The Court rejects defendants' arguments.

In regard to Dr. Greenwald, the Court finds that his testimony is relevant because it is probative of the industry custom and historical practices of the garment industry -- an issue specifically deemed material to the third factor set forth in the Second Circuit's decision in *Zheng II*, 355 F.3d at 73. Moreover, Dr. Greenwald's testimony is admissible as expert testimony under *Rule 702 of the Federal Rules of Evidence* and pursuant to the standard enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). [**18] Dr. Greenwald is qualified as an expert on the topic of labor practices in the garment industry based on his extensive publi-

cations on this subject, his educational background, and his occupation, as outlined in his *curriculum vitae*. (*See* Greenwald Rept. at 22-25). In addition, his opinions are based on reliable historical data. Finally, his testimony is likely to assist [*293] the trier of fact in assessing "industry custom and historical practice" in the garment industry.[4] *See, e.g., Nimely v. City of New York*, 414 F.3d 381, 396-97 (2d Cir. 2005).

In regard to Mr. Vanegas, the Court also finds that his testimony is relevant to the "custom and historical practices inquiry" and that he is qualified as an expert under *Rule 702* and *Daubert*. Mr. Vanegas is qualified as an expert based on his experience and knowledge [**19] gained as a compliance officer and investigator for the Department of Labor's Wage and Hour Division from 1987 to 2002, where he was charged with, *inter alia*, monitoring and enforcing garment manufacturers' compliance with FLSA's wage and hours requirements. (*See* Vanegas Decl. PP 4-8.) According to Mr. Vanegas, from 1999 through April 2002, he served as the Department of Labor's New York City District's Office Wage and Hour manager, where he supervised 30 labor investigators and remained involved in compliance with labor laws in the garment

---

[4] The Court also notes that, in another case regarding the same contracting device at issue here, Judge Glasser found that Dr. Greenwald was qualified under *Rule 702* to serve as an expert on labor practices in the garment industry, and that his testimony was relevant to the industry custom and historical practices inquiry outlined in *Zheng II*. *See Chen*, 364 F. Supp. 2d at 283 n.15.

industry. (*Id.*) Mr. Vanegas also indicates that he left the Department of Labor in 2002 to work for private organizations that "monitor garment businesses' compliance with wage and hour requirements." (*Id.* P 8 & n.2.)

Furthermore, Mr. Vanegas' report and declaration are based upon reliable data and methodology -- namely, his experiences in investigating manufacturers in the garment industry in New York and elsewhere in order to determine their compliance with federal wage and hours requirements. *See Chen*, 364 F. Supp. 2d at 284 n.7 (reaching a similar conclusion as to the data and methodology relied upon by Mr. Vanegas in preparing a report in that [**20] action). Finally, the Court concludes that Mr. Vanegas' testimony is likely to assist the trier of fact in evaluating the "custom and historical practices" of the garment industry. *See Zheng II*, 355 F.3d at 72.

4. Fourth Factor

The fourth *Zheng II* factor is "whether responsibility under the contracts could pass from one subcontractor to another without material changes." *Zheng II*, 355 F.3d at 72. It is undisputed that, if Liberty Apparel switched to another contractor, plaintiffs would *not* have "continue[d] to do the same work [for Liberty Apparel] in the same place." *Zheng II*, 355 F.3d at 73; *see* May 13 Tr. at 21 (Plaintiffs' Counsel: "I think that, essentially, all the contractors were in the same position vis-a-vis Liberty and . . . you could substitute one for the other . . . ."). Thus, the Court finds that there is no

genuine dispute as to the fact that plaintiffs worked for Liberty Apparel "only to the extent that their direct employer [was] hired by" Liberty Apparel, and, therefore, "this factor does not in any way support the determination that a joint employment relationship exists." *Zheng II*, 355 F.3d at 74.

5. Fifth Factor

The fifth *Zheng II* factor concerns "the degree to which [**21] the Liberty Defendants or their agents supervised plaintiffs' work." *Zheng II*, 355 F.3d at 72. For the following reasons, the Court finds that there is a genuine issue as to whether defendants' engaged in "extensive supervision" of plaintiffs' work, thereby exercising "effective control of the terms and conditions of the plaintiff[s'] employment . . . ." *Zheng II*, 355 F.3d at 75 (citing *Rutherford*, 331 U.S. at 726).

Plaintiffs have presented a substantial amount of evidence demonstrating that representatives of Liberty Apparel exercised "effective control" over plaintiffs' employment through close supervision of plaintiffs' work. *Id.* Specifically, various plaintiffs have submitted declarations wherein they indicate, *inter alia*, that two representatives of Liberty Apparel engaged in the following conduct:

> (1) They "monitored" plaintiffs' work by visiting the factory two to four days a week for up to three hours a day;
>
> (2) They inspected individual garments prepared by the workers for mistakes;

> (3) They provided direct instructions to workers on correcting mistakes in garments;
>
> (4) They exhorted plaintiffs to work harder and faster; and
>
> (5) They promised workers that, if they finished a certain [**22] number of garments, the Liberty Apparel representatives would bring the workers' pay to them.

(*See* Luo Decl. PP 3-6; Yang Decl. PP 5-6; Lin Decl. PP 3-5; Lam Decl. PP 8-10; Yang Decl. PP 7-10; Dong Decl. PP 5-7; Zheng Decl. PP 6-8.) The above-cited evidence establishes a genuine issue of material fact as to whether defendants' supervision of plaintiffs exceeded the monitoring of "contractual warranties of quality and time of delivery" that is commonplace in legitimate subcontracting relationships and, instead, constituted sufficiently close supervision so as to indicate defendants' "effective control" over the conditions of plaintiffs' employment. *Zheng II*, 355 F.3d at 75.

In response to plaintiffs' submissions regarding this factor, defendants argue that: (1) Judge Casey resolved this factor against plaintiffs in the first summary judgment decision and, therefore, *res judicata* bars relitigation of this issue; (2) Nigri has testified that Liberty Apparel employed only one "quality control" monitor who was directed to make brief visits to the Contractor Corporations' factories (Nigri Decl. PP 14, 22, 24, 25); and (3) even assuming *arguendo* the truth of plaintiffs' assertions, the supervision [**23] described by plaintiffs in this action establishes that defendants neither

"kept close touch on the [*294] operation," as in *Rutherford*, 331 U.S. at 730, nor supervised plaintiffs during the entirety of their working day, as in *Chen v. Street Beat Sportswear, Inc.*, 364 F. Supp. 2d at 287. (*See* Defs.' Supp. Mem at 4-5). The Court finds that defendants' arguments fail to establish that there is no genuine issue of material fact as to defendants' "effective control" of plaintiffs' working conditions. *Zheng II*, 355 F.3d at 75.

First, the Second Circuit vacated Judge Casey's decision regarding plaintiffs' FLSA claims and the analogous state law claims. *See Zheng II*, 355 F.3d at 79. A "judgment vacated or set aside has no preclusive effect." *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir.1992); *see, e.g., Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 78 (2d Cir. 2007);

Second, Nigri's assertions as to the number and the conduct of Liberty Apparel employees at the factory directly contradicts plaintiffs' sworn assertions regarding the Liberty Apparel representatives. This is precisely the type of material factual dispute that cannot be resolved at the summary judgment stage.

Third, the Court rejects [**24] defendants' argument that, assuming *arguendo* the truth of plaintiffs' assertions, the purported level of supervision in this case is not sufficiently "close" to withstand summary judgment, as it was in *Rutherford* and *Chen*. Defendants fail to cite any authority in support of the proposition that the factual circumstances found in *Rutherford* and *Chen* established the *minimal* level of supervision necessary to support a FLSA claim. Rather, it is clear that plaintiffs

have sufficiently demonstrated that defendants engaged in "extensive supervision" of plaintiffs' work so that a reasonable jury could find in plaintiffs' favor on this issue. *See Zheng II*, 355 F.3d at 72.

Accordingly, the Court finds that there are several genuine issues of material fact preventing summary judgment on this factor. Thus, construing the evidence in the light most favorable to plaintiffs, and drawing all reasonable inferences in their favor, the Court finds that this factor weighs in favor of finding that Liberty Apparel was a joint employer of plaintiffs. *See Zheng II*, 355 F.3d at 76.

6. Sixth Factor

The sixth *Zheng II* factor is "whether plaintiffs worked exclusively or predominantly for the Liberty Defendants." [**25] *Zheng II*, 355 F.3d at 72. For the following reasons, the Court finds that there is a genuine issue of material fact regarding the portion of plaintiffs' work that was performed for Liberty Apparel.

The Second Circuit has indicated that, in order for this factor to weigh in plaintiffs' favor, plaintiffs' must perform more than a "mere[ ]" majority of their work for Liberty Apparel, but, rather, must work "exclusively or predominantly" on Liberty Apparel's garments. *Zheng II*, 355 F.3d at 75. In their respective declarations submitted to the Court, plaintiffs variously assert that they performed approximately "a large majority" (Zheng Decl. P 4), "[m]ore than two-thirds" (Yang Decl. P 3), "70 percent" (Lam Decl. P 5; Dong Decl. P 4),

or "three quarters" (Luo Decl. P 3; Lin Decl. P 3) of their work for Liberty Apparel. Thus, construing this evidence in the light most favorable to plaintiffs, the Court considers these submissions as indicating that plaintiffs performed approximately 70% to 75% of their work for Liberty Apparel.

In response, defendants submit the declaration of defendant Nigri, wherein he asserts that plaintiffs performed "only 10% to 15%" of their work on Liberty Apparel items. [**26] (*See* Nigri Decl. P 28.) Nigri appears to have derived this figure from his review of individual plaintiffs' handwritten notes and records. (*See id.*) Nigri's assertions [*295] clearly contradict those of plaintiffs and, therefore, present a disputed issue of fact that this Court is unable to resolve at the summary judgment stage.

Defendants also assert that, even assuming *arguendo* the truth of plaintiffs' assertions, the purported amount of work plaintiffs performed for Liberty Apparel "constitute[d] a mere majority . . . ." (Defs.' Reply Mem. at 6.) However, defendants have failed to present any support for the proposition that the portion of plaintiffs' work purportedly performed for Liberty Apparel -- namely, 70% to 75% -- constitutes a "mere majority" of work under *Zheng II*. Rather, it is clear that a reasonable jury could find, on the basis of the evidence proffered by plaintiffs, that plaintiffs performed work "predominantly" for Liberty Apparel. *See Zheng II*, 355 F.3d at 75.

Accordingly, the Court finds that there is a genuine issue of material fact as to whether plaintiffs performed work "exclusively or predominantly" for

Liberty Apparel. Thus, construing the evidence in the light most [**27] favorable to plaintiffs, and drawing all reasonable inferences in their favor, the Court finds that this factor weighs in favor of a finding of joint employment. *See Zheng II*, 355 F.3d at 76.

7. Balancing the *Zheng II* Factors:

In order to grant summary judgment, this Court "need not decide that *every* factor weighs against [a finding] of joint employment. *Zheng II*, 355 F.3d at 77. However, where, as here, half of the factors weigh in favor of a finding that Liberty Apparel was a joint employer of plaintiffs, the Court finds summary judgment on the "ultimate issue of FLSA coverage" is inappropriate. *Zheng II*, 355 F.3d at 76 n.13. Thus, because there are genuine disputes as to material facts underlying three of the six factors outlined in *Zheng*, the Court denies defendants' motion for summary judgment against plaintiffs' FLSA claims.

B. Plaintiffs' Claims under *New York Labor Law § 652(1)* and NYCRR § 142-2

Defendants' motion against plaintiffs' claims under *New York Labor Law § 652(1)* and NYCRR § 142-2 also fails for the same reasons discussed above. As the Second Circuit observed in *Zheng II*, the success of plaintiffs' claims under *New York Labor Law § 652(1)* and NYCRR § 142-2 -- like plaintiffs' [**28] claims under FLSA -- "is dependent on a finding of joint employment," and, in analyzing this issue, New York courts look to similar

factors as did the court in *Zheng II* when analyzing "joint employment relationships."[5] *See Zheng II,* 355 F.3d at 78. Therefore, because the Court has concluded that there is a genuine issue of material fact as to whether Liberty Apparel was a joint employer of plaintiffs under FLSA, that conclusion similarly requires the denial of defendants' motion against plaintiffs' state law claims.

C. Plaintiffs' Claims under *New York Labor Law § 345-a*

In *Zheng II,* the Second Circuit also "reinstated" plaintiffs' claims under *New York Labor Law § 345-a. See* 355 F.3d at 79. Defendants now seek summary judgment against such [**29] claims. In response, plaintiffs argue that the "law of the case" [*296] doctrine requires this Court to reject defendants' motion. For the following reasons, the Court finds that the "law of the case" doctrine does not apply, but, nevertheless, rejects defendants' motion against the *§ 345-a* claims.

1. Law of the Case

As an initial matter, the Court rejects plaintiffs' argument that the "law of the case" doctrine requires this Court to deny defendants' motion as

[5] The Court also notes that defendants have asserted, both in their written briefs and during oral argument before the Court, that the standards for determining Liberty Apparel's "joint employer" status are "identical" under New York State and federal law, and that the success of defendants' motion against both types of claims is predicated on the same issue -- defendants' joint employer status. (*See* Defs.' Reply Mem. at 8; May 13 Tr. at 62-63, 71.)

to plaintiffs' *§ 345-a* claims. (*See* Pls.' Mem. at 28.) In *Zheng I,* Judge Casey found that "[p]laintiffs . . . have presented sufficient evidence to create an issue of fact" as to defendants' liability under *§ 345-a*; ultimately, however, Judge Casey declined to exercise supplemental jurisdiction over such claims, as the court had dismissed plaintiffs' federal claims. *Zheng I,* 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *9. Thus, Judge Casey's conclusion regarding the merits of defendants' motion against the *§ 345-a* claims was clearly *dictum,* and, therefore, should not be afforded preclusive effect as the law of this case. *See Carroll v. Lessee of Carroll,* 57 U.S. (16 How.) 275, 286-87, 14 L. Ed. 936 (1853) (finding that, if a point of law "might have been decided either way [**30] without affecting any right brought into question, then, according to the principles of the Common Law, an opinion on such a question is not a decision . . . .") (cited with approval in *Jimenez v. Walker,* 458 F.3d 130, 142, 143 (2d Cir. 2006)); *see also Schwabenbauer v. Bd. of Educ. of City School Dist. of City of Olean,* 777 F.2d 837, 842 (2d Cir. 1985) (finding that conclusions voiced in dicta does not bind the court's subsequent rulings)

Moreover, even assuming *arguendo* that Judge Casey's statement in *Zheng I* was not *dictum,* it should not be accorded preclusive effect as the law of this case because *Zheng I* was vacated on appeal. "[W]here a court has vacated an earlier order, the doctrine of the law of the case no longer applies." *Schwartz v. Chan,* 142 F. Supp. 2d 325, 330 (E.D.N.Y. 2001) (citing *Johnson v. Bd. of Ed.,* 457

U.S. 52, 53-54, 102 S. Ct. 2223, 72 L. Ed. 2d 668 (1982)) ("Because we have vacated the Court of Appeals' judgments . . . the doctrine of the law of the case does not constrain either the District Court or . . . the Court of Appeals."). In *Zheng II*, the Second Circuit specifically held that "[t]he District Court's judgment dismissing . . . the *N.Y. Labor Law § 345-a* claim is therefore vacated . . [**31] . ." *Zheng II*, 355 F.3d at 79-80. Thus, whatever the substance of Judge Casey's findings as to defendants' motion against the *§ 345-a* claims, that judgment has been vacated and, therefore, the law of the case doctrine does not apply.

Accordingly, the Court proceeds to evaluate the merits of defendants' motion against the *§ 345-a* claims, and finds that defendants' motion must fail.

2. Defendants' Motion Against Plaintiffs' *§ 345-a* Claims

For the following reasons, the Court finds that plaintiffs have presented sufficient evidence to withstand defendants' motion for summary judgment against the *§ 345-a* claims.

Unlike FLSA, *§ 345-a* does *not* require a finding of joint employment. Rather, the statute imposes liability on any manufacturer "who contracts or subcontracts with another manufacturer or contractor for the performance of any apparel industry service . . . and who knew or should have known with the exercise of reasonable care or diligence of such other manufacturer's or contractor's failure to comply with article six [regarding the payment of

wages] or nineteen [regarding New York's minimum wage provisions] of this chapter in the performance of such service shall be liable for such [**32] failure." *N.Y. Labor Law § 345-a(1).*

[*297] Here, plaintiffs have proffered sufficient evidence to create a genuine issue as to whether Liberty Apparel "knew or should had known" that the Contractor Corporations were violating New York wage provisions. Specifically, plaintiffs have presented evidence demonstrating that: (1) Liberty Apparel contracted with the Contractor Corporations "for the performance of [an] apparel industry service," *N.Y. Labor Law § 345-a(1)*; (2) Liberty Apparel representatives engaged in close supervision of plaintiffs' work; and (3) plaintiffs told Liberty Apparel's representatives on multiple occasions that plaintiffs were not being paid for contracting work they had performed for Liberty Apparel. (*See* Bing Decl. P 6; Lin Decl. P 5; Zheng Decl. P 8.)

Therefore, based on this evidence, and drawing all reasonable inferences in plaintiffs' favor, the Court finds that a reasonable jury could find that Liberty Apparel violated *§ 345-a* -- namely, that Liberty Apparel entered into a contract for an "apparel industry service" and that, through its representatives, Liberty Apparel "knew or should have known with the exercise of reasonable care or diligence of such other . . [**33] . contractor's failure to comply" with New York's wage and overtime compensation provisions.

Defendants fail to offer any persuasive arguments in support of their motion against the *§ 345-a*

claims. In their original moving papers, defendants merely offered conclusory denials of plaintiffs' evidence regarding the notice received by Liberty Apparel's representatives of the nonpayment of wages to plaintiffs. (*See* Defs.' Mem. at 21.) However, such unsupported denials of plaintiffs' evidence, cannot, as a matter of law, satisfy defendants' burden at the summary judgment stage.

Moreover, based on statements made by defendants in their supplemental brief and at oral argument, it appears that defendants have withdrawn their motion as to the *substance* of plaintiffs' claims under *§ 345-a*. (*See* Defs.' Supp. Br. at 8.) Instead, defendants now ask that, in the event that the Court dismisses plaintiffs' federal claims, the Court decline to exercise supplemental jurisdiction over the *§ 345-a* claims. However, because this Court has denied defendants' motion against the FLSA claims, it rejects defendants' request to decline jurisdiction over plaintiffs' state law claims.

D. Plaintiffs' Claims Against [**34] the Individual Defendants

Defendants move for summary judgment against plaintiffs' claims concerning the individual defendants, Nigri and Laniado. For the following reasons, the Court finds that there are genuine issue of material fact precluding summary judgment on these claims.

1. Law of the Case

As an initial matter, the Court rejects plaintiffs' argument that the law of the case doctrine requires this Court to reject the individual defendants' motion. In *Zheng I*, Judge Casey found that "Nigri and Laniado's alleged lack of operational control over the non-moving Defendants is not dispositive on the issue of whether they may be individually liable under the FLSA," and, therefore, "examine[d] Nigri, Laniado and Liberty's alleged liability under the FLSA jointly." *2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *6.* However, in *Zheng II*, the Second Circuit vacated the judgement in *Zheng I* dismissing the FLSA claims, and reinstated the FLSA and state law claims against the "Liberty Defendants" -- a group that *included* Nigri and Laniado. *See Zheng II*, 355 F.3d at 79-80. Therefore, because the holding in *Zheng I* regarding the individual defendants' liability was vacated by the Second Circuit, the law of the case doctrine [**35] does not apply to that holding, *see Johnson*, 457 U.S. at 53-54, [*298] and this Court must conduct an independent analysis of the issue.

2. The Individual Defendants' Motion

a. Legal Standard

In cases where a corporation is a worker's joint employer, individual officers or directors of that corporation may also "be deemed employers under the FLSA where 'the individual has overall operational control of the corporation, possesses an ownership interest in it, controls significant functions

of the business, or determines employees' salaries and makes hiring decisions.'" *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 192 (S.D.N.Y.2003) (internal citation omitted); *see Jiao v. Shi Ya Chen*, No. 03 Civ. 0165 (DF), 2007 U.S. Dist. LEXIS 96480, 2007 WL 4944767, at *10 (S.D.N.Y. Mar. 30, 2007); *see also Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998) ("At bottom, [the] economic reality analysis focuse[s] on the role played by the corporate officers in causing the corporation to undercompensate employees and to prefer the payment of other obligations and/or the retention of profits."). "The Second Circuit has not developed a specific test for determining an individual officer's liability, [**36] stating instead that 'the overarching concern is whether the alleged employer possessed the power to control the workers in question.'" *Jiao*, 2007 U.S. Dist. LEXIS 96480, 2007 WL 4944767, at *10 (quoting *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999)). The individual officer's control, however, need not have been "absolute": "[c]ontrol may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence."[6] *Herman*, 172 F.3d at 139 (internal quotation marks and citations omit-

[6] The parties assert, and this Court so finds, that the analysis for individual liability under both FLSA and New York State law are identical, [**37] at least under the circumstances of the instant case.

ted); *see also Zheng II*, 355 F.3d at 69 ("[T]he broad language of the FLSA . . . demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA."); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1989) ("An employer does not need to look over his workers' shoulders every day in order to exercise control.").

b. Analysis

The Court finds that plaintiffs have proffered sufficient evidence that Nigri and Laniado exercised "operational control" over Liberty Apparel so as to create a genuine issue of material fact as to their liability under FLSA and its state law analogues. *Ansoumana*, 255 F. Supp. 2d at 192. Specifically, plaintiffs have proffered evidence demonstrating that:

> (1) Nigri and Laniado were co-owners and the sole officers of Liberty Apparel (Nigri Dep. at 7-10; Laniado Dep. at 6-12);
>
> (2) Nigri was responsible for the "day-to-day" management of the company and Laniado was responsible for "sales and merchandising" (*id.* at 12);
>
> (3) both Nigri and Laniado were aware, at a minimum, of the existence of the contracting relationship whereby plaintiffs performed garment assembly work for Liberty Apparel (*see* Nigri Dep. at 52-57, 62-67, 72-77; Laniado Dep. at 26-32, 35-39, 44-46); and

(4) both Nigri and Laniado had visited the premises of "sewing contractor[s]" hired by Liberty Apparel (*see* Nigri [*299] Dep. at 62-67, 72-77; Laniado Dep. at 35-39, 44-46).

Defendants fail to offer any persuasive arguments in response to this evidence. Rather, in regard [**38] to Nigri, defendants merely assert that, "[f]or the same reasons [Liberty Apparel] is not a joint employer . . . defendant Nigri is also not an employer." (Defs.' Supp. Br. at 8.) This argument therefore fails for the same reasons discussed above in regard to Liberty Apparel's motion for summary judgment.

Moreover, in regard to Laniado, defendants assert that Laniado could not have exercised "operational control" over Liberty Apparel because he (1) "was a minority shareholder" and (2) "did not work in the production part of Liberty." (*Id.*) However, while there may be distinctions to be drawn at trial as to the individual defendants' respective responsibilities, the Court finds, construing the above-cited evidence in the light most favorable to plaintiffs and drawing all reasonable inferences in their favor, that there are genuine issues of material fact as to whether the individual defendants jointly or independently exercised "operational control" over Liberty Apparel. In other words, a reasonable jury could find that Nigri and/or Laniado are subject to individual liability for the alleged violations of FLSA and New York State law. *See Moon v. Kwon*, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002).

IV. [**39] CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is denied in its entirety.

So Ordered.

/s/ Richard J. Sullivan
RICHARD J. SULLIVAN
United States District Judge

Dated: May 30, 2008
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, CUI ZHEN LIN, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, and XUE JIN LIN,

Plaintiffs-Appellants,

v.

LIBERTY APPAREL COMPANY, INC., ALBERT NIGRI, and HAGAI LANIADO,

Defendants-Cross-Claimants-Appellees,

NGON FONG YUEN, 88 FASHION INC., TOP FIVE SPORTSWEAR, INC., S.P.R. SPORTSWEAR, INC. and 91 FASHION INC.,

Defendants,

LAI HUEN YAM, a/k/a Steven Yam, 998 FASHIONS, INC. and 103 FASHION INC.,

Defendants-Cross-Defendants.

Docket No. 02-7826
355 F.3d 61;
2003 U.S. App. LEXIS 26528;
149 Lab. Cas. (CCH) P34,799;
9 Wage & Hour Cas. 2d (BNA) 336

January 16, 2003 Argued

December 30, 2003, Decided

OPINION

[*63] JOSE A. CABRANES, *Circuit Judge*:

This case asks us to decide whether garment manufacturers who hired contractors to stitch and finish pieces of clothing were "joint employers" within the meaning of the *Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq.*, and New York law. Plaintiffs, garment workers in New York City who were directly employed by the contractors, claim that the manufacturers were their joint employers because they worked predominantly on the manufacturers' garments, they performed a line-job that was integral to the production of the manufacturer's product, and their work was frequently and directly supervised by the manufacturers' agents. The manufacturers respond that the contractors, [*64] who, among other things, hired and paid plaintiffs to assemble clothing for numerous manufacturers, were plaintiffs' sole employers. Both plaintiffs and the manufacturers moved for

summary judgment on the issue of joint employment.

The United States District [**3] Court for the Southern District of New York (Richard Conway Casey, *Judge)*, applying the four-factor test set forth in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), granted the manufacturers' motion, and held that the manufacturers could not be held liable for violations of the *FLSA* or its New York statutory analogues. The District Court also declined to exercise supplemental jurisdiction over a surviving New York claim.

We conclude that the District Court erred when it limited its analysis to the four factors identified in *Carter*. Accordingly, we vacate the judgment of the District Court and remand the cause to the District Court with instructions concerning further proceedings.

BACKGROUND

The relevant facts are laid out in Judge Casey's opinion, *Ling Nan Zheng v. Liberty Apparel Co.*, No. 99 Civ. 9033, 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *1-2 (S.D.N.Y. Mar. 13, 2002), and we recount only those facts necessary to resolve the issues on appeal. Unless otherwise noted, the facts are undisputed.

Plaintiffs-Appellants are 26 non-English-speaking adult garment workers who worked in a factory at 103 Broadway in New York's Chinatown. They brought [**4] this action against both (1) their immediate employers, six contractors doing busi-

ness at 103 Broadway ("Contractor Corporations") and their principals (collectively, "Contractor Defendants"), and (2) Liberty Apparel Company, Inc. ("Liberty") and its principals, Albert Nigri and Hagai Laniado (collectively, "Liberty Defendants"). Because the Contractor Defendants either could not be located or have ceased doing business, plaintiffs have voluntarily dismissed their claims against those defendants with prejudice. Accordingly, plaintiffs now seek damages only from the Liberty Defendants.

Liberty, a "jobber" in the parlance of the garment industry, is a manufacturing company that contracts out the last phase of its production process. That process, in broad terms, worked as follows: First, Liberty employees developed a pattern for a garment, cut a sample from the pattern, and sent the sample to a customer for approval. Once the customer approved the pattern, Liberty purchased the necessary fabric from a vendor, and the vendor delivered the fabric to Liberty's warehouse. There, the fabric was graded and marked, spread out on tables, and, finally, cut by Liberty employees.

After the fabric [**5] was cut, Liberty did not complete the production process on its own premises. Instead, Liberty delivered the cut fabric, along with other essential materials, to various contractors for assembly. The assemblers, in turn, employed workers to stitch and finish the pieces, a process that included sewing the fabrics, buttons, and labels into the garments, cuffing and hemming the garments, and, finally, hanging the garments.

The workers, including plaintiffs, were paid at a piece rate for their labor.

From March 1997 through April 1999, Liberty entered into agreements with the Contractor Corporations under which the Contractor Corporations would assemble garments to meet Liberty's specifications. During that time period, Liberty utilized as many as thirty to forty assemblers, including the Contractor Corporations. Liberty did not seek out assemblers; instead, [*65] assemblers came to Liberty's warehouse looking for assembly work. In order to obtain such work, a prospective assembler was required by Liberty to sign a form agreement.

Plaintiffs claim that approximately 70-75% of their work during the time period at issue was for Liberty. They explain that they knew they were working for Liberty [**6] based on both the labels that were sown into the garments and the specific lot numbers that came with the garments. Liberty's co-owner, Albert Nigri, asserts that the percentage of the Contractor Corporations' work performed for Liberty was closer to 10-15%. He derives that figure from individual plaintiffs' handwritten notes and records.

The parties do not dispute that Liberty employed people to monitor Liberty's garments while they were being assembled. However, the parties dispute the extent to which Liberty oversaw the assembly process. Various plaintiffs presented affidavits to the District Court stating that two Liberty representatives -- a man named Ah Sen and "a Taiwanese woman" -- visited the factory approximately two to four times a week for up to three

hours a day, and exhorted the plaintiffs to work harder and faster. In their affidavits, these plaintiffs claim further that, when they finished working on garments, Liberty representatives -- as opposed to employees of the Contractor Corporations -- inspected their work and gave instructions directly to the workers if corrections needed to be made. One of the plaintiffs also asserts that she informed the "Taiwanese woman" that the [**7] workers were not being paid for their work at the factory.

Albert Nigri, on the other hand, avers that Liberty's quality control person made brief visits to assemblers' factories and was instructed to speak only with Lai Huen Yam, a co-owner of the Contractor Corporations, or with his wife. Furthermore, Nigri asserts in his affidavit that Liberty representatives were expected to spend just thirty minutes at each of the assemblers' work sites. Finally, Nigri states that Liberty did not employ two quality control persons simultaneously; did not employ a quality control person during some of the relevant time period; and did not employ a man as a quality control person.

In their complaint, plaintiffs alleged that both the Liberty Defendants and the Contractor Defendants violated *29 U.S.C. § 206* and *N.Y. Lab. Law § 652(1)* ("§ 652(1)"), which require an employer to pay employees a legally mandated minimum wage. Plaintiffs alleged further that all of the defendants, including Liberty and its principals, violated *29 U.S.C. § 207* and *N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2* ("*§ 142-2*"), which require employers

[**8] to compensate employees at one-and-one-half times the regular rate when an employee works in excess of 40 hours per week. Additionally, plaintiffs alleged that defendants violated *N.Y. Lab. Law § 191*, which requires employers to pay manual workers on a weekly basis, and *N.Y. Lab. Law § 193*, which prevents employers from making unauthorized deductions from employees' wages. Finally, plaintiffs alleged that, in violation of *N.Y. Lab. Law § 345-a* ("*§ 345-a*") -- a statutory provision that applies to the apparel industry only -- Liberty Defendants entered into contracts with the Contractor Corporations even though they knew, or should have known, that the Contractor Corporations failed to comply with the provisions of New York law that govern the payment of wages.

Liberty Defendants moved for summary judgment on all claims against them on the ground that plaintiffs were not their employees. Plaintiffs cross-moved for summary [*66] judgment, seeking a determination that they were employed by Liberty. In a March 13, 2002 Opinion and Order, the District Court granted Liberty Defendants' motion for summary judgment and dismissed [**9] every federal and state claim in the complaint on the merits except the claim arising under *N.Y. Lab. Law § 345-a*, which does not require an employment relationship. *See Zheng, 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *7-9*. The District Court determined that Liberty Defendants were not joint employers under the *FLSA* because, based on the plaintiffs' own admissions, these defendants did not (1) hire and fire the plaintiffs, (2) supervise

and control their work schedules or conditions of employment, (3) determine the rate and method of payment, or (4) maintain employment records. *See id.* (applying the factors identified in *Carter*, 735 F.2d at 12). The District Court then declined to exercise pendent jurisdiction over the surviving claim under *N.Y. Lab. Law § 345-a*, and dismissed the complaint. *Id.* at *9.

Plaintiffs appeal (1) the District Court's grant of summary judgment dismissing the *FLSA* claims; (2) the dismissal on the merits of plaintiffs' claims under New York's statutory analogues to the *FLSA*, *i.e.*, the *§ 652(1)* and § 142-2 claims; and (3) the District Court's refusal to exercise pendent jurisdiction over [**10] the *§ 345-a* claim.[1]

DISCUSSION

I. *FLSA* Claims

A. Competing Economic Reality Tests

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). An entity "employs" an individual under the FLSA if it "suffers or permits" that individual to work. 29 U.S.C. § 203(g). This definition is necessarily a broad one, in accordance with the remedial purpose of the *FLSA*. *See United States v. Rosenwasser*, 323 U.S. 360, 363, 89 L. Ed. 301, 65 S. Ct. 295 & n. 3,

[1] Plaintiffs do not appeal the dismissal of the claims brought under *N.Y. Lab. Law § 191* (payment on a weekly basis) and *N.Y. Lab. Law § 193* (unauthorized deductions).

323 U.S. 360, 89 L. Ed. 301, 65 S. Ct. 295 (1945); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988).

An entity "suffers or permits" an individual to work if, as a matter of "economic reality," the entity functions as the individual's employer. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33, 6 L. Ed. 2d 100, 81 S. Ct. 933 (1961) [**11] (explaining that " 'economic reality' rather than 'technical concepts' is . . . the test of employment" under the statute); *see also Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) ("The overarching concern is whether the alleged employer possessed the power to control the workers in question."). The regulations promulgated under the *FLSA* expressly recognize that a worker may be employed by more than one entity at the same time. *See 29 C.F.R. § 791.2 (2003)*; *see also Torres-Lopez v. May*, 111 F.3d 633, 639-45 (9th Cir. 1997) (permitting claims against joint employers under *FLSA*); *Antenor v. D & S Farms*, 88 F.3d 925, 929-38 (11th Cir. 1996) (same). In the present case, it is undisputed that the Contractor Defendants, who are no longer parties to this suit, employed plaintiffs. The issue is whether the Liberty Defendants also employed them.

In previous cases, we have applied two different tests to determine whether an employment relationship exists in light of the Supreme Court's admonition that "economic reality" govern our application of the *FLSA*. In *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), [**12] we [*67] held that an inmate conducting

tutorial classes in a program managed by a community college had raised genuine issues of material fact as to whether the college was an employer under the *FLSA*, where, among other things, the college sent compensation directly to the inmate and set the inmate's tutoring schedule. *See Carter*, 735 F.2d at 13-15. To reach that conclusion, we evaluated whether the college

> (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

See Carter, 735 F.2d at 12 (borrowing factors from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

More recently, we applied the same four-factor test in *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999), and affirmed the trial court's judgment, after a bench trial, that a company's chairman and co-owner qualified as a joint employer under the *FLSA*. We ratified the District Court's judgment because "evidence in the record supported at [**13] least three of the four [Carter] factors." *Id.* at 140.

Four years after deciding *Carter* but more than ten years before deciding *Herman*, we decided *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988). There, en route to affirming the District Court's determination after a bench trial that nurses engaged by a health-care service were employees

of the service rather than independent contractors, we applied a different, more expansive test. That test, drawn from cases distinguishing employees from independent contractors, examined

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

See Superior Care, 840 F.2d at 1058-59 (citing, *inter alia, United States v. Silk*, 331 U.S. 704, 716, 91 L. Ed. 1757, 67 S. Ct. 1463 (1947)).

We have stated that "the [four-factor] *Bonnette* test, [**14] " borrowed by us from the Ninth Circuit in *Carter*, "is useful largely in cases involving claims of joint employment[,]" *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996), [2] because,

---

[2] Other courts of appeals have made the same observation. *See Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994) ("The *Bonnette* factors are properly applied when an individual is clearly employed by one of several entities and the only question is which one. They are of no help, however, in deciding the more fundamental question present here: whether the inmates are 'employed' in the relevant sense at all."); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) ("The *Bonnette* factors, with their emphasis on control over the terms and structure of the employment relationship, are particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an 'employer' and the question is which one.").

when an entity exercises those four prerogatives, that entity, in addition to any primary employer, must be considered a joint employer. The *Superior Care* factors, on the other hand, and particularly factors two and three -- the workers' investment in the business, and the degree of skill and independent initiative required of workers -- have been used primarily to distinguish independent contractors from employees, because, unlike the *Carter* factors, they do [*68] not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer. Instead, they help courts determine if particular workers are independent of *all* employers.

[**15] Despite this distinction between joint employment cases and independent contractor cases, we have never suggested that, in analyzing joint employment, the four *Carter* factors alone are relevant, and that other factors that bear on the relationship between workers and potential joint employers should be ignored. Thus, in *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S. D.N.Y. 1998), which arose out of a factual backdrop somewhat similar to ours, Judge Denise Cote attempted to combine the tests used in *Carter* and *Superior Care*. Drawing on those two cases, along with the Supreme Court's decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947),[3] Judge Cote concluded that the following *seven* factors should be considered in determining whether

[3] *Rutherford* is analyzed in detail at pp. 14-15, *post*.

garment workers are jointly employed by a "jobber":

> (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective;
>
> (2) whether the putative joint employer's premises and equipment were used for the work;
>
> (3) the extent of the putative [**16] employees' work for the putative joint employer;
>
> (4) the permanence or duration of the working relationship between the workers and the putative joint employer;
>
> (5) the degree of control exercised by the putative joint employer over the workers;
>
> (6) whether responsibility under the contract with the putative joint employer passed "without material changes" from one group of potential joint employees to another; and
>
> (7) whether the workers had a "business organization" that could or did shift as a unit from one putative joint employer to another.

See Lopez, 14 F. Supp. 2d at 419-20.[4] In choosing these factors, Judge Cote concluded that the four

[4] Judge Cote also considered factors that were specific to the factual record before her, namely the family ties between the manufacturer and the contractor and the manufacturers' acceptance of substandard work from the contractor. *Id.* at 422-23.

factors identified in *Carter* could not, on their own, constitute the "economic reality" test, because they rarely permit a finding of joint employment "outside of situations involving direct corporate subsidiaries or managing administrators." *Id.* at 415. However, Judge Cote concluded also that the five *Superior Care* factors, on their own, likewise could not make up the "economic reality" test, because those factors, when applied to joint employment cases, are "equally [**17] skewed in the opposite direction." *Id.*

The District Court in this case expressly declined to follow *Lopez*. Citing *Herman*, 172 F.3d at 139, Judge Casey reasoned that, in order to be held liable under the *FLSA*'s economic reality test, "an alleged employer must, at a minimum, possess the power to control the workers in question." *Zheng*, 2002 U.S. Dist. 4226, 2002 WL 398663, at *6. The Court then declared that the *Carter* test, which was reaffirmed in *Herman*, remains the law of the Circuit for determining whether an entity possesses the requisite control over workers, and that *Lopez* cannot be reconciled with *Carter*. *Id.* Applying the [*69] four *Carter* [**18] factors only, the District Court concluded that the Liberty Defendants lacked sufficient control over plaintiffs to qualify as joint employers, and thus granted their motion for summary judgment. *Id.* at *7.

B. Need for Remand

We conclude, for the reasons set forth below, that the District Court erred when, based *exclusively* on the four factors mentioned in *Carter*, it determined

that the Liberty Defendants were not, as a matter of law, joint employers under the *FLSA*. In our view, the broad language of the *FLSA*, as interpreted by the Supreme Court in *Rutherford*, demands that a district court look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the *FLSA*. Moreover, as explained below, neither *Carter* nor *Herman* supports the application of a rigid four-part test in the instant case. In those cases, we held only that the four factors applied by the District Court in this case can be *sufficient* to establish employer status. We did not hold, nor under *Rutherford* could we have held, that a positive finding on those four factors is *necessary* to establish [**19] an employment relationship. Accordingly, the District Court's judgment in favor of the Liberty Defendants must be vacated.

1. The Language of the Statute

As noted above, the relevant provision of the FLSA, *29 U.S.C. § 203(g)*, defines "employ" as including "to suffer or permit to work." This is "'the broadest definition [of 'employ'] that has ever been included in any one act,' " *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3, 89 L. Ed. 301, 65 S. Ct. 295 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black)),[5] and it encom-

[5] Senator Black introduced the bill that would become the *Fair Labor Standards Act of 1938*. *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 464, 466 (1939).

passes "working relationships, which prior to [the *FLSA*], were not deemed to fall within an employer-employee category," *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51, 91 L. Ed. 809, 67 S. Ct. 639 (1947).

[**20] Measured against the expansive language of the *FLSA*, the four-part test employed by the District Court is unduly narrow, as it focuses solely on the formal right to control the physical performance of another's work. That right is central to the common-law employment relationship, see *Restatement of Agency* § 220(1) (1933) ("A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."), and, therefore, the four-factor test may approximate the common-law test for identifying joint employers. However, the four-factor test cannot be reconciled with the "suffer or permit" language in the statute, which necessarily reaches beyond traditional agency law. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (noting that the "suffer or permit to work" formulation "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); *Bartels v. Birmingham*, 332 U.S. 126, 130, 91 L. Ed. 1947, 67 S. Ct. 1547 (1947) [**21] (explaining that, under the economic reality test, "employees" are not limited to those who are subject to the physical control of an employer). Indeed, the narrow approach used by

the District Court may be [*70] *more* rigid than the common-law approach.[6]

2. *Rutherford*

Rutherford confirmed that the definition of "employ" in the *FLSA* cannot be reduced to formal control over the physical performance of another's work. In *Rutherford* [**22], the Supreme Court held that a slaughterhouse jointly employed workers who de-boned meat on its premises, despite the fact that a boning supervisor -- with whom the slaughterhouse had entered into a contract -- directly controlled the terms and conditions of the meat boners' employment. Specifically, the supervisor, *rather than the slaughterhouse*, (i) hired and fired the boners, (ii) set their hours, and, (iii) after being paid a set amount by the slaughterhouse for each one hundred pounds of de-boned meat, paid the boners for their work. *Rutherford*, 331 U.S. at 726, 730.

In determining that the meat boners were employees of the slaughterhouse notwithstanding the role played by the boning supervisor, the Court examined the "circumstances of the whole activity,"

---

[6] At common law, factors other than those identified by the District Court can be considered in determining whether the requisite control exists to establish an employment relationship. *See Restatement of Agency* § 220(2) (explaining that, *inter alia*, the skill required in a particular occupation and the length of time that an individual is employed are relevant in determining if a worker is an employee or an independent contractor); *cf. Restatement of Agency* § 220, cmt. b ("The relationship of master and servant is one not capable of exact definition.").

id. at 730, but also isolated specific relevant factors that help distinguish a legitimate contractor from an entity that "suffers or permits" its subcontractor's employees to work. First, the Court noted that the boners "did a specialty job on the production line"; that is, their work was "a part of the integrated unit of production" at the slaughterhouse. *Id.* at 729-30. The [**23] Court noted also that responsibility under the boning contracts passed from one boning supervisor to another "without material changes" in the work performed at the slaughterhouse; that the slaughterhouse's premises and equipment were used for the boners' work; that the group of boners "had no business organization that could or did shift as a unit from one slaughterhouse to another"; and that the managing official of the slaughterhouse, in addition to the boners' purported employer, closely monitored the boners' performance and productivity. *Id.* Based on its analysis of these factors, the Court imposed *FLSA* liability on the slaughterhouse.

Like the case at bar, *Rutherford* was a joint employment case, as it is apparent from the Supreme Court's opinion that the boners were, first and foremost, employed by the boning supervisor who had entered into a contract with the slaughterhouse. *See id.* at 724-25 (explaining that the boning supervisor exercised the prerogatives of an employer, including hiring workers, managing their work, and paying them). *Rutherford* thus held that, in certain circumstances, an entity can be a joint employer under the *FLSA* even when [**24] it

does not hire and fire its joint employees, directly dictate their hours, or pay them.[7]

[*71] **3.** ***Carter*** **and** ***Herman***

Carter and *Herman* are consistent with *Rutherford*, and neither case supports the application of the test used by the District Court in the circumstances presented in the instant case to negate employer liability. The [**25] question before us in *Carter* was whether prisoners who performed work for an educational institution could be considered employees of that institution under the *FLSA*. *Carter*, 735 F.2d at 12. In rejecting the district court's conclusion that they could not be considered employees as a matter of law, we did not purport to identify all factors that could bear on the employer status question. Instead, we stated that the economic reality test "*include[s]*" an inquiry into the four factors. *Id.* (emphasis added). We then determined that summary judgment in favor of the defendant was inappropriate considering that the defendant exercised most of the "typical employer prerogatives" encompassed by the four factors. *Id.*

---

[7] There is no discussion in the Supreme Court's opinion in *Rutherford* about whether the slaughterhouse kept employment records for the workers in the de-boning operation, but the Tenth Circuit's earlier decision in the case indicates that it did not. *See Walling v. Rutherford Food Corp.*, 156 F.2d 513, 515-16 (10th Cir. 1946) (noting that the boners were not mentioned in any union contracts, that the slaughterhouse did not collect their union dues, and that "the plant operator never included the boners in its Workmen's Compensation liability policy and never made any deductions for unemployment compensation or withholding taxes").

at 14-15. Carter thus stands solely for the proposition that the four factors applied by the District Court in the instant case can be *sufficient* to establish employer status. *Carter* did not hold, nor could it have held in light of *Rutherford*, that those factors are *necessary* to establish an employment relationship.[8]

[**26] In our more recent decision in *Herman*, moreover, we affirmed the District Court's determination after a bench trial that a company chairman jointly employed the company's employees where the chairman exercised three of the four employer prerogatives identified in *Carter*. In doing so, we reiterated that "economic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition." *Herman*, 172 F.3d at 139 (emphasis in original). Thus, as in *Carter*, we indicated in *Herman* that where the four factors weigh in favor of a district court's finding of joint employment, that finding will not be disturbed on appeal. We did not suggest -- indeed, we expressly denied -- that the four factors borrowed from the Ninth Circuit in

---

[8] Although it dealt with the distinction between an independent contractor and an employee rather than with joint employment, *Superior Care* likewise counsels against a rigid approach. In *Superior Care*, we stated that "the factors that have been identified by various courts in applying the economic reality test are not exclusive." *Superior Care*, 840 F.2d at 1059. Rather, "since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided." *Id.*

Carter are the exclusive touchstone of the joint employment inquiry under the *FLSA*.

Because the District Court in the instant case interpreted our precedents to demand an exclusive four-factor test, we vacate its judgment and remand for further proceedings.

C. Instructions on Remand

1. Factors to Be Applied

On [**27] remand, the District Court must determine whether the Liberty Defendants should be deemed to have been the plaintiffs' joint employer. This determination is to be based on "the circumstances of the whole activity," *Rutherford*, 331 U.S. at 730, viewed in light of "economic reality," *Goldberg*, 366 U.S. at 33. We discuss below factors, drawn from *Rutherford*, which we think the court will find illuminating in these circumstances. The court is also free to [*72] consider any other factors it deems relevant to its assessment of the economic realities.

The factors we find pertinent in these circumstances, listed in no particular order, are (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the

Liberty Defendants or their agents supervised [**28] plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants. *See Rutherford,* 331 U.S. at 724-25, 730; *see also Lopez*, 14 F. Supp. 2d at 416-18 (summarizing the factors considered in *Rutherford).*

These particular factors are relevant because, when they weigh in plaintiffs' favor, they indicate that an entity has functional control over workers even in the absence of the formal control measured by the *Carter* factors. Thus, in *Rutherford*, by looking beyond the boning supervisor's formal prerogatives, the Supreme Court determined, based principally on the factors listed above, that the slaughterhouse dictated the terms and conditions of the boners' employment. First, although it did not literally pay the workers, the slaughterhouse *de facto* set the workers' wages, because the boners did no meat boning for any other firm and shared equally in the funds paid to the boning supervisor. See *Rutherford*, 331 U.S. at 726, 730. The slaughterhouse also controlled employee work schedules, both because the boners' hours were dependent on the number of cattle slaughtered, and also because [**29] the slaughterhouse manager was constantly "after" the boners about their work. *See Rutherford*, 331 U.S. at 726. Finally, the slaughterhouse effectively "controlled the [boners'] . . . conditions of employment," *Carter*, 735 F.2d at 12, because the boners worked for the slaughterhouse as an in-house boning unit on the slaughterhouse's premises, *see id.* at 730. In sum, the relationship between the slaughterhouse and the successive boning

supervisors who managed the boners had no substantial, independent economic purpose; instead, it was most likely a subterfuge meant to evade the *FLSA* or other labor laws.

The first two factors derived from *Rutherford* require minimal discussion. The first factor -- namely, whether a putative joint employer's premises and equipment are used by its putative joint employees -- is relevant because the shared use of premises and equipment may support the inference that a putative joint employer has functional control over the plaintiffs' work. Similarly, the second factor -- namely, whether the putative joint employees are part of a business organization that shifts as a unit from one putative joint employer to another -- is [**30] relevant because a subcontractor that seeks business from a variety of contractors is less likely to be part of a subterfuge arrangement than a subcontractor that serves a single client. Although neither shared premises nor the absence of a broad client base is anything close to a perfect proxy for joint employment (because they are both perfectly consistent with a legitimate subcontracting relationship), the factfinder can use these readily verifiable facts as a starting point in uncovering the economic realities of a business relationship.

[*73] The other factors we have pointed out are less straightforward. *Rutherford* considered the extent to which plaintiffs performed a line-job that is integral to the putative joint employer's process of production. Interpreted broadly, this factor could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a

function that a general contractor deems "integral" to a product or a service. However, we do not interpret the factor quite so broadly. The factor is derived from the *Rutherford* Court's statement that the boners at the slaughterhouse should be considered joint employees because, *inter* [**31] *alia*, "[they] did a specialty job on the production line." *Rutherford*, 331 U.S. at 730. Based on this statement in *Rutherford*,[9] along with similar language in decisions interpreting *Rutherford*, *see, e.g.*, *Antenor*, 88 F.3d at 937 (noting that farmworkers were "analogous to employees working at a particular position on a larger production line" (citing *Rutherford*, 331 U.S. at 729-30)), we construe *Rutherford* to mean that work on a production line occupies a special status under the *FLSA*, at least when it lies on "the usual path of an employee," *id.* at 729.

Rutherford, however, offers no firm guidance [**32] as to how to distinguish work that "in its essence, follows the usual path of an employee," *id.*, from work that can be outsourced without attracting increased scrutiny under the *FLSA*. In our view, there is no bright-line distinction between these two categories of work. On one end of the spectrum lies the type of work performed by the boners in *Rutherford* -- *i.e.*, piecework on a producer's premises that requires minimal training or

---

[9] In the course of its opinion, the *Rutherford* Court noted also that the boners' work constituted "part of the integrated unit of production," *id.* at 729, and that "the slaughterhouse operations, of which the boning is a part, are carried on in a series of interdependent steps," *id.* at 725.

equipment, and which constitutes an essential step in the producer's integrated manufacturing process. On the other end of the spectrum lies work that is not part of an integrated production unit, that is not performed on a predictable schedule, and that requires specialized skills or expensive technology. In classifying business relationships that fall in between these two poles, we are mindful of the substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy. *See, e.g.*, *The Outing of Outsourcing*, The Economist, Nov. 25, 1995, at 57, 57 (noting that outsourcing "is part and parcel of the way American companies of all sizes do business"). [**33] We are also mindful that manufacturers, and especially manufacturers of relatively sophisticated products that require multiple components, may choose to outsource the production of some of those components in order to increase efficiency. *See, e.g.*, Ravi Venkatesan, *Strategic Sourcing: To Make or Not to Make*, Harv. Bus. Rev., Nov./Dec. 1992, at 98 (arguing that manufacturers should outsource the production of components to maximize efficiency). Accordingly, we resist the temptation to say that any work on a so-called production line -- no matter what product is being manufactured -- should attract heightened scrutiny. Instead, in determining the weight and degree of factor (3), we believe that both industry custom and historical practice should be consulted. Industry custom may be relevant because, insofar as the practice of using subcontractors to complete a particular task is

widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws. At the same time, historical practice may [*74] also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, [**34] the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws. Ultimately, this factor, like the other factors derived from *Rutherford* is not independently determinative of a defendant's status, because the mere fact that a manufacturing job is not typically outsourced does not necessarily mean that there is no substantial economic reason to outsource it in a particular case. However, as *Rutherford* indicates, the type of work performed by plaintiffs can bear on the overall determination as to whether a defendant may be held liable for an FLSA violation.[10]

---

[10] It bears noting that this factor does not simply measure the amount of initiative or judgment required for a job. We agree with the view of Judge Cote in *Lopez* that the amount of initiative or judgment required for a job, which we considered in *Superior Care,* 840 F.2d at 1058-61, is of "minimal value for deciding whether workers already acknowledged to be the employees of one employer should likewise be deemed the employees of the second employer," *Lopez,* 14 F. Supp. 2d at 415, as it tests principally for a worker's independence from all employers rather than for a worker's dependence on a particular employer, *see id.* Although there may be an overlap between jobs that require little initiative or judgment and line-jobs, there are undoubtedly jobs that require little initiative or judgment that are not line-jobs, and that are typically performed by subcontractors. Likewise, there are undoubtedly jobs that require substantial initiative and judgment that are rarely outsourced.

[**35] The fourth factor the Court considered in *Rutherford* is whether responsibility under the contracts could pass from one subcontractor to another without material changes. That factor is derived from the *Rutherford* Court's observation that "the responsibility under the boning contracts without material changes passed from one boner to another." *Rutherford*, 331 U.S. at 730. In the quoted passage, the Supreme Court was referring to the fact that, even when the boning supervisor abandoned his position and another supervisor took his place (as occurred several times, *see id.* at 725), the *same* employees would continue to do the *same* work in the *same* place. Under *Rutherford*, therefore, this factor weighs in favor of a determination of joint employment when employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor. In such circumstances, it is difficult *not* to draw the inference that a subterfuge arrangement exists. Where, on the other hand, employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired [**36] by that entity, this factor does not in any way support the determination that a joint employment relationship exists.[11]

[11] The district court in *Lopez* appears to have concluded that this factor weighs in favor of joint employment when a general contractor uses numerous subcontractors who compete for work and have *different* employees. *See Lopez*, 14 F. Supp. 2d at 422. We reject this view. Indeed, if this view were adopted, factor (4) would classify nearly all subcontracting relationships as joint employment relationships -- a result that finds no support either in the law or in our country's commercial practices.

The fifth factor listed above -- namely, the degree to which the defendants supervise the plaintiffs' work -- also requires some comment, as it too can be misinterpreted to encompass run-of-the-mill subcontracting relationships. Although *Rutherford* indicates that a defendant's extensive supervision of a plaintiff's work is indicative of an employment relationship, *see Rutherford*, 331 U.S. at 730 [**37] (noting that "the managing [*75] official of the plant kept close touch on the operation"), *Rutherford* indicates also that such extensive supervision weighs in favor of joint employment only if it demonstrates effective control of the terms and conditions of the plaintiff's employment, *see Rutherford*, 331 U.S. at 726 (suggesting the slaughterhouse owner's close scrutiny of the boners' work played a role in setting the boners' schedule); *see also Antenor*, 88 F.3d at 934 (growers exercised control over farmworkers when their supervision of the workers affected the workers' schedule). By contrast, supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement. *See Moreau v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003) (supervision of workers not indicative of joint employment where principal merely gave "specific instructions to a service provider" concerning performance under a service contract); *cf.* James Brian Quinn and Frederick G. Hilmer, *Strategic Outsourcing* [**38] , Sloan Mgmt. Rev., Summer 1994, at 43, 53 (explaining that "the most successful out-

sourcers find it absolutely essential to have both close personal contact and rapport at the floor level and political clout and understanding with the supplier's top management").

Finally, the *Rutherford* Court considered whether the purported joint employees worked exclusively or predominantly for the putative joint employer. In describing that factor, we use the words "exclusively or predominantly" on purpose. As noted in *Lopez*, the extent of work performed for a putative joint employer is "not described in any decision . . . as a separate factor for consideration." *Id.* at 417. However, it has "implicitly [been] a factor," *id.*, in cases in which the purported joint employees worked exclusively or predominantly for the purported joint employer. *See Rutherford*, 331 U.S. at 724-25 (meat boners worked full-time on slaughterhouse's premises); *Antenor*, 88 F.3d at 927 (harvesters worked solely on growers' land even though they were hired by contractor). In those situations, the joint employer may *de facto* become responsible, among other things, for [**39] the amount workers are paid and for their schedules, which are traditional indicia of employment. [12] On the other hand,

---

[12] Factor (2) listed above -- *i.e.*, whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another -- overlaps substantially with the factor discussed here -- *i.e.*, whether all or nearly all of the Contractor Corporations' work was performed for the Liberty Defendants. The factors are not identical, however, and capture different aspects of a business relationship's "economic reality." For example, factor (2), but not factor (6), would weigh in favor of joint employment if a

where a subcontractor performs merely a majority of its work for a single customer, there is no sound basis on which to infer that the customer has assumed the prerogatives of an employer.

[**40] In sum, by looking beyond a defendant's formal control over the physical performance of a plaintiff's work, the "economic reality" test -- which has been distilled into a nonexclusive and overlapping set of factors -- [*76] gives content to the broad "suffer or permit" language in the statute. *See* 29 U.S.C. § 203(g) (stating that an entity "employs" an individual for purposes of the *FLSA* if it "suffers or permits" that individual to work). However, by limiting *FLSA* liability to cases in which defendants, based on the totality of the circumstances, function as employers of the plaintiffs rather than mere business partners of plaintiffs' direct employer, the test also ensures that the statute is not interpreted to subsume typical outsourcing relationships. The "economic reality" test, therefore, is intended to expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the *FLSA*.

---

subcontractor were to work exclusively for two or three general contractors on those contractors' premises without the resources to work for any other contractor. By contrast, factor (6), but not factor (2), would weigh in favor of joint employment if a subcontractor worked solely for a single client but had the ability to seek out other clients at any time. Together, these two factors help the factfinder determine if a subcontractor's apparent dependence on particular contractors translates into functional control by those contractors over the subcontractor's employees.

2. Application of the Factors on Remand

We intimate no view as to whether plaintiffs, under a proper application of the economic reality test derived from [**41] *Rutherford*, will have presented sufficient evidence to survive a renewed motion for summary judgment on remand. We note, however, that under our existing precedents, the inquiry as to whether an entity is an employer for purposes of the *FLSA* involves three types of determinations. First, there are historical findings of fact that underlie each of the relevant factors. Second, there are findings as to the existence and degree of each factor. Finally, there is the conclusion of law to be drawn from applying the factors, *i.e.*, whether an entity is a joint employer. *See Superior Care*, 840 F.2d at 1059 (citing, *inter alia, Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043-45 (5th Cir. 1987)).

The first two determinations -- the findings of historical fact and the findings as to the existence and degree of each factor -- are findings of fact that must be accepted on appeal unless clearly erroneous.[13] *See Superior Care*, 840 F.2d at 1059; *cf. Walling v. General Indus. Co.*, 330 U.S. 545, 550, 91 L. Ed. 1088, 67 S. Ct. 883 (1947) (whether each

---

[13] The fact-intensive character of the joint employment inquiry is highlighted by the fact that two of the three leading cases in this circuit were appeals from judgments following bench trials. *See Herman*, 172 F.3d at 135; *Superior Care*, 840 F.2d at 1057. In the third case, we decided that genuine issues of material fact *precluded* summary judgment on the ultimate issue of *FLSA* coverage. *See Carter*, 735 F.2d at 15.

of the individual factors exist that render an employee an "executive" under the *FLSA* [**42] is a factual question subject to the "clearly erroneous" standard set forth in *Fed. R. Civ. P. 52(a)*). Only the last determination -- the ultimate decision as to whether a party is an employer -- is a legal conclusion that is reviewed *de novo*. *See Superior Care*, 840 F.2d at 1059; *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 89 L. Ed. 2d 739, 106 S. Ct. 1527 (1986) ("The question whether [the plaintiffs'] particular activities exclude them from the overtime benefits of the *FLSA* is a question of law.").

[**43] In order to grant summary judgment for defendants, the District Court would have to conclude that, even where both the historical facts and the relevant factors are interpreted in the light most favorable to plaintiffs, defendants are still entitled to judgment as a matter of law.[14] To reach

---

[14] The Supreme Court has specifically cautioned courts of appeals not to engage in independent fact-finding after concluding that a district court has applied the wrong factors in classifying an individual or an entity under the *FLSA*. *See Icicle*, 475 U.S. at 714 (concluding that the Ninth Circuit erred when it made factual findings to support its determination that individuals were not "seamen" within the meaning of the *FLSA*). Here, to determine that defendants are entitled to judgment as a matter of law even if we interpret the facts in the light most favorable to plaintiffs, we would not need to engage in formal factfinding. Nevertheless, *Icicle* remains relevant, because in *Icicle*, the Supreme Court vacated the Ninth Circuit's judgment even though the Ninth Circuit's factual findings appeared to be undisputed. *See Icicle*, 474 U.S. at 716-17 (Stevens, J., dissenting). Thus, the Court suggested that, with respect to the fact-intensive classifications required by the *FLSA*, courts of appeals should avoid even straightforward factual determinations.

[*77] this conclusion, the Court need not decide that *every* factor weighs against joint employment. The Ninth Circuit, for example, recently concluded -- in affirming a grant of summary judgment -- that Air France did not jointly employ ground maintenance workers at the airline's San Francisco terminal for the purposes of the Family and Medical Leave Act ("FMLA"),[15] despite the fact that Air France representatives directly supervised many of the workers, and even trained some of them. *See Moreau*, 343 F.3d at 1189-90. The Court reasoned that, even if all reasonable inferences were drawn in the plaintiff's favor,[16] there was insufficient evidence in the record on which to base the conclusion that the plaintiff was an employee of the airline. *Id.* at 1190-91.

---

[15] The definition of "employ" in the FMLA is the same as the definition of "employ" in the *FLSA*. *See* 29 U.S.C. § 2611(3) ("The terms 'employ', 'employee', and 'State' have the same meanings given such terms in subsections *(c)*, *(e)*, and *(g) of section 203* of this title."). Thus, in determining whether a joint employment relationship existed under the FMLA, the *Moreau* Court borrowed directly from the *FLSA*'s joint employment case law. *See Moreau*, 343 F.3d at 1183-85 (relying primarily on the Ninth Circuit's own decisions in *Bonnette* and *Torres-Lopez)*.

[16] Notably, although the Ninth Circuit doubted whether "many of the functions, such as food service or cargo transport, are actually 'integral' to a passenger airline," and also whether "this factor translates well outside of the production line employment situation," *id.* at *27, the Court assumed, for the purposes of Air France's summary judgment motion, that the various services are "integral" to the airline, *id.* Nevertheless, the Court concluded that "this factor (even if coupled with Air France's 'indirect' supervision of employees) does not outweigh the numerous significant factors discussed above." *Id.*

Because the process of isolating and then applying the relevant factors, even at the summary judgment stage, is closely akin to the District Court's fact-finding function under *Fed. R. Civ. P. 52(a)*, we do not think it is advisable to apply the *Rutherford* factors in the first instance on appeal.

[**44]

[**45] Although summary judgment might also be granted to plaintiffs even when isolated factors point against imposing joint liability, *see, e.g., Antenor*, 88 F.3d at 937-38 (growers are employers as a matter of law even though middleman rather than growers exercised some employer prerogatives), the District Court's conclusion that, in the present circumstances, the record cannot support summary judgment in plaintiffs' favor, remains undisturbed. This case is quite different from *Rutherford*, in which the Supreme Court concluded that the slaughterhouse was a joint employer as a matter of law. In *Rutherford*, unlike in this case, *every* relevant factor described above weighed in favor of a joint employment relationship, and the record as a whole compelled the conclusion that the slaughterhouse exercised functional control over the boners. *See Rutherford*, 331 U.S. at 730. Should the District Court, on remand, deny summary judgment in favor of defendants, it will be incumbent upon the Court to conduct a trial.[17]

---

[17] To the extent it conflicts with this analysis, we disagree with the District Court's decision in *Lopez* to grant summary judgment in plaintiffs' favor. However, we note that *Lopez* was different from this case in several ways: First, the "historical facts" in *Lopez* were largely undisputed, *see Lopez* 14

[**46] [*78] **II. State Law Claims**

The District Court specifically addressed just two of plaintiffs' five state law claims. First, the District Court dismissed plaintiffs' overtime compensation claim under *N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2* -- which is analogous to the overtime compensation claim brought under *29 U.S.C. § 207* -- based on "the same analysis" it applied to the *FLSA* claims. *Zheng*, 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *6 n. 3. Next, the Court refused to dismiss plaintiffs' *N.Y. Lab. Law § 345-a* claim -- which forbids a garment manufacturer from contracting out work to an entity knowing that the entity failed to comply with New York law governing the payment of wages -- on the ground that a disputed issue of fact exists as to whether Liberty Defendants knew or should have known how much plaintiffs were being paid. However, the Court declined to exercise pendent jurisdiction over the *§ 345-a* claim.

The District Court did not refer to plaintiffs' claims under *N.Y. Labor Law §§ 191, 193, and 652(1). Section 652(1)* is analogous to 19 U.S.C. § 206, and requires an employer to pay [**47] the minimum wage. *Section 191* requires employers to pay manual workers on a weekly basis, and *section*

F. Supp. 2d at 407-08; second, the Court characterized the relationship between the manufacturer and one of the contractors as "becoming so extensive and regular as to approach one of exclusive agency," *id.* at 421; and third, the Court considered several factors that were "wholly specific to its record," *id.* at 422.

193 forbids unauthorized deductions from employees' wages. Like the § 142-2 claim and unlike the *§ 345-a* claim, each of these claims is dependent on a finding of joint employment. *Compare N.Y. Labor Law § 191* ("Every employer shall pay wages ."), *N.Y. Labor Law § 193* ("No employer shall make any deduction . . . ."), *and § 652(1)* ("Every employer shall pay . . . ."), *with § 345-a* (imposing liability on any "manufacturer . . . who contracts . . . with . . . [a] contractor . . . who knew or should have known . . . of [the] contractor's failure to comply with article six or nineteen of this chapter . . . ."). Thus, the District Court's analysis of the *§ 142-2* claim applies to these three claims, and we assume the Court intended to dismiss these claims on the merits.

For the same reasons that we vacate so much of the District Court's judgment as dismissed the *FLSA* claims, we also vacate so much of the District Court's judgment as dismissed the analogous New York claims -- that is, those claims brought under § 142-2 and [**48] *§ 652(1)*. The overtime compensation claim under § 142-2 is governed by the definitions in *12 NYCRR § 142-2.16*, and the minimum wage claim under *§ 652(1)* is governed by the definitions in *New York Labor Law § 651*. Like the *FLSA*, the former covers "any individual employed, suffered or permitted to work by an employer," *12 NYCRR § 142-2.16(a)*, and the latter covers "any individual employed or permitted to work by an employer in any occupation," *N.Y. Lab. Law § 651(5)*.

Just as federal courts interpreting the "suffer or permit" language have looked beyond common-law agency principles in analyzing joint employment relationships, so too have New York courts. *See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474, 476 (N. Y. 1918) (Cardozo, J.) (applying "sufferance" or "permission" standard to hold milk delivery business liable for delivery man's practice of employing a minor even though the delivery man directly set the terms and conditions of the minor's employment). The District Court therefore erred when it relied exclusively on the [*79] four *Carter* factors to dismiss both the [**49] § 142-2 claim and the *§ 652(1)* claim, and these claims are reinstated.

Plaintiffs' *§ 345-a* claim, over which the District Court declined to exercise pendent jurisdiction, is likewise reinstated. It appears that the District Court did not exercise jurisdiction over the *§ 345-a* claim principally because the *FLSA* claims were dismissed before trial. *See Zheng*, 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *9 (apparently relying on *28 U.S.C. § 1367(c)(3)*, which permits a District Court not to exercise pendent jurisdiction when it "has dismissed all claims over which it had original jurisdiction").[18] Because the *FLSA* claims

[18] The District Court's exact rationale for declining jurisdiction over the *§ 345-a* claim is somewhat unclear. After noting that a district court may retain jurisdiction over a state law claim even after all federal claims have been dismissed, the Court quoted *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), for the proposition that "if the federal claims are dismissed

are now reinstated, *28 U.S.C. § 1367(c)(3)* no longer provides a basis for declining to exercise jurisdiction over the *§ 345-a* claim.

[**50] As a final matter, we reiterate that plaintiffs have not challenged the dismissal of their claims under *N.Y. Labor Law §§ 191 and 193*, which are governed by a narrower definition of employment applicable to Article 6 of New York's labor statute. *See N.Y. Lab. Law § 190* (defining "employer" and "employee" without using the "suffer or permit" language). Accordingly, we need not address those claims, the disposition of which remains undisturbed.

CONCLUSION

To summarize, we hold that the District Court erred when, based exclusively on the four factors identified in *Carter v. Dutchess Community Col-*

---

before trial . . . the state claims should be dismissed as well." Instead of resting on *Gibbs* alone, however, the Court went on to note that "it appears that, as of yet, no state court has interpreted *section 345-a of New York Labor Law*," *Zheng*, 2002 U.S. Dist. LEXIS 4226, 2002 WL 398663, at *9, thus invoking a separate ground for declining jurisdiction, *see* 28 U.S.C. § 1367(c)(1) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if the claim raises a novel or complex issue of State law[.]"). Based on its quotation from *Gibbs*, we interpret the District Court to have declined to exercise jurisdiction over the *§ 345-a* claim on the ground that the *FLSA* claims were dismissed. We intimate no view as to whether, on remand, the District Court should exercise any discretion it may have to dismiss the *§ 345-a* claim on the separate and independent ground that it presents a novel or complex issue of state law.

lege, 735 F.2d 8 (2d Cir. 1984), it concluded, as a matter of law, that Liberty and its principals were not joint employers within the meaning of the *FLSA*. Under the broad language of *29 U.S.C. § 203(g)*, as interpreted in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947), a district court must look beyond traditional agency principles before declaring that the entity is not an employer under the *FLSA*. Accordingly, although an entity's exercise of an employer's [**51] formal prerogatives -- hiring and firing, supervising schedules, determining rate and method of payment, and maintaining records -- may be sufficient to establish joint employment under the *FLSA*, it is not necessary to establish joint employment.

For the same reasons, we also hold that the District Court erred when it concluded, based exclusively on the four *Carter* factors, that Liberty and its principals were not joint employers within the meaning of New York's statutory analogues to the *FLSA*.

The District Court's judgment dismissing the *FLSA* claims, the New York statutory [*80] analogues to those claims, and the *N.Y. Labor Law § 345-a* claim is therefore vacated, and the cause is remanded to the District Court for further proceedings consistent with this opinion and our instructions.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

---

99 Civ. 9033 (RCC)
2002 U.S. Dist. LEXIS 4226
March 12, 2002 Decided
March 13, 2002 Filed

LING NAN ZHENG, *et al.*,

Plaintiffs,

v.

LIBERTY APPAREL COMPANY, INC., *et al.*

Defendants.

OPINION AND ORDER

RICHARD CONWAY CASEY, U.S.D.J.:

Plaintiffs [*2] are all adult garment workers who worked in a garment factory at 103 East Broadway in New York's Chinatown.[1] They bring this action

---

[1] The twenty-six plaintiffs named in the Complaint are Ling Nan Zheng, Ren Zhu Yang, Yun Zhen Huang, Wen Qin Lin, Sai Bing Wang, Ye Biao Yang, Cui Zhen Lin, Rong Yun Zhen, Hui Fang Lin, Xiu Ying Zheng, Jin Ping Lin, Hui Ming Dong, Yu Bing Lou, Sao Chi Kwok, Sai Xian Tang, Yi Zhen Lin, Rui Fang Zhang, Mei Juan Yu, Mei Ying Li, Qin Fang Qui, Yi Mei Lin, Mei Zhu Dong, Fung Lam, Xiu Zhu Ye, Sing Kei Lam and Zue Jin Lin.

against: Liberty Apparel Company, Inc. ("Liberty"), a garment manufacturing company; Albert Nigri ("Nigri") and Hagai Laniado ("Laniado"), who are co-owners and officers of Liberty; six corporations doing business as contractors in the garment industry ("Contractor Corporations") [2]; as well as Ngon Fong Yuen ("Yuen") and Lai Huen Yam (also known as Steven Yam)("Yam"), who are co-owners, directors and officers of the Contractor Corporations (all referred to jointly as "Defendants"). Plaintiffs are seeking monetary and declaratory relief to redress alleged violations of the Fair Labor Standards Act of 1938, as amended ("FLSA"), the New York Compilation of Codes, Rules and Regulations ("NYCRR"), and New York Labor Law. Defendants Liberty, Nigri and Laniado ("Moving Defendants") initially moved this Court for summary judgment and then Plaintiffs cross-moved for summary judgment, seeking a determination that Plaintiffs were Moving Defendants' employees under the FLSA and New York Labor Law. For the reasons stated herein, Moving Defendants' motion for summary [*3] judgment is granted in part and denied in part, and Plaintiffs' motion for summary judgment is denied.

---

[2] The six Contractor Corporations named as Defendants in the Complaint are: 88 Fashion Inc.; 998 Fashions, Inc.; Top Five Sportswear, Inc.; 103 Fashion Inc.; S.P.R. Sportswear, Inc.; and 91 Fashion Inc.

I. JURISDICTION

The Court has subject matter jurisdiction over this matter pursuant to *29 U.S.C. § 216(b)* and *28 U.S.C. §§ 1331, 1337 & 1367.*

II. BACKGROUND

A. *Facts*

Liberty is a garment manufacturing company that designs, produces, [*4] markets and sells clothing for resale to the public. Compl. P 17. Liberty contracts out certain phases of the assembly process, such as cutting and sewing, to other entities that, in turn, hire workers to perform such tasks. *Id.* It appears that Moving Defendants entered into such a contract with the Contractor Corporations, and that Yuen and Yam then hired Plaintiffs as production workers who were compensated at piece rates. *Id.* P 18.

Typically, the manufacturing process begins with the creation of a pattern by Liberty employees. Nigri Aff. P 7. Based on the pattern, Liberty sends a sample to the customer for approval and then to the warehouse maintained by Liberty, where Liberty employees use the pattern and sample to cut the garments out of fabric provided by Liberty. *Id.* PP 7-8. Next, the cut fabric is sent to a middleman assembler company, here, Defendant Yam and three of the Contractor Corporations, 998 Fashions, Inc. ("998"), 103 Fashion Inc. ("103"), and S.P.R. Sportswear, Inc. ("SPR"), to stitch and finish the pieces. The process of stitching and finishing the pieces includes the sewing of fabrics, buttons,

and labels, as well as cuffing, hemming, cutting threads [*5] and hanging garments. *Id.* P 9. The assembler companies employ workers to perform these tasks and pay them at a piece rate. Compl. P 18. During the relevant time period, Liberty utilized the services of approximately thirty to forty assemblers: Affidavit of Albert Nigri, dated October 31, 2000 [Nigri Aff.], P 15 n.9.

The parties do not dispute the fact that Liberty employed persons to monitor quality control. *Id.* P 20; Affidavit of Albert Nigri, dated January 16, 2001 [Nigri Reply Aff], PP 10-13. The quality control person made visits to the assemblers' factories "to inspect the appearance and quality of the finished garments and to make certain that Liberty's garments were being worked upon." Nigri Aff. P 13.

Plaintiffs, who all worked in a factory at 103 East Broadway, allege that a representative from Liberty visited the factory approximately two to four times a week on average and that the representative monitored Plaintiffs' work for up to three hours a day. Compl. P 8; Declaration of Ling Nan Zheng [Zheng Decl.], Exhibit C of Reif Declaration [Reif Decl.], P 6; Declaration of Mei Zhu Dong [Dong Decl.], Exh. F of Reif Decl., PP 5. In their affidavits, Plaintiffs [*6] swear that as they finished working on garments, the Liberty representative would inspect their work and give instructions if corrections or changes needed to be made. Declaration of Ren Zhu Yang [Yang Decl.], Exh. E of Reif Decl., P 9; Declaration of Fung Lam [Lam Decl.], Exh. D of Reif Decl., P 8. One of the Plaintiffs also swears that she informed the Liberty representa-

tives on many occasions of the fact that the workers were not being paid. Zheng Decl. P 8. The affidavits state further that the representatives exhorted Plaintiffs to work harder and faster and that on occasion a representative had gotten angry at the workers. Dong Decl. PP 6-7.

In response, Moving Defendants contend that Liberty's quality control person was specifically instructed: to speak only to Yam or Yam's wife; not to communicate with any employees; and, not to instruct the employees on their work. Nigri Aff. P 20. The Moving Defendants do not, however, provide any affidavits from the persons employed for quality control stating either that they did not in fact communicate with the workers or that they were not told that Plaintiffs were not being paid. Moving Defendants further contend that the quality [*7] control persons were expected to spend only thirty minutes at each of the assemblers' shops or factories. Nigri Reply Aff. P 14. Again, there are no affidavits from the quality control persons stating that they in fact spent no more than thirty minutes per visit.

In his affidavit, Nigri swears that Moving Defendants: did not employ two quality control persons simultaneously; did not employ a quality control person during some of the relevant time period; and did not employ a man as a quality control person. *Id.* P 10-13. However, Plaintiffs' affidavits only make the general claim that two different Liberty representatives would visit the factories to monitor their work; they do not call them quality control persons, nor do they state that the representatives

were employed by Liberty during specific time periods or even the same time period.

Lastly, the parties dispute the percentage of Plaintiffs' work that consisted of Liberty garments. In their affidavits, Plaintiffs state that approximately 70 - 75% of their work was for Liberty during the relevant time period. They explain that they knew when they were working on Liberty garments because of the distinctive labels that needed [*8] to be sewn in the garments as well as the specific lot numbers that came with the garments. Zheng Decl. P 4; Lam Decl. P 5. In his affidavit however, Nigri argues, based on Plaintiffs' handwritten notes and records, that the percentage was closer to 10 - 15%.

B. *Claims*

Moving Defendants claim that all of Liberty's dealings with SPR, 103 and 998 were at arms length and not as a joint employer of Plaintiffs. Accordingly, the Moving Defendants argue that, to the extent Plaintiffs have a claim for unpaid wages against the Contractor Corporations, such claim cannot implicate Moving Defendants.

However, Plaintiffs allege that Moving Defendants and Contractor Corporations functioned as an integrated economic unit and that Moving Defendants exercised significant control over Plaintiffs by supervising and controlling the substance of Plaintiffs' daily work, as well as directly monitoring the quality of the garments. Compl. P 19. Plaintiffs allege that Defendants employed

Plaintiffs during various time periods ranging from November 1998 through April 1999, and that Defendants, in each case, failed to pay Plaintiffs: for certain periods of their employment; at the minimum rates required [*9] by the FLSA and New York Labor Law; and for overtime compensation above the rate of regular pay. *See id.* PP 23-45 (setting forth the individual allegations with respect to each Plaintiff).

More specifically, Plaintiffs allege that Defendants violated *29 U.S.C. § 207* and Title 12 of the NYCRR Section 142-2.2, which require employers to compensate employees at one and one-half times the regular rate when an employee works in excess of 40 hours per week. Plaintiffs also allege that Defendants violated *29 U.S.C. § 206*, which requires an employer to pay employees a legally-mandated minimum wage, and that Defendants violated a similar provision of *New York Labor Law, Section 652(1)*. Plaintiffs further allege that Defendants violated *New York Labor Law Section 191*, which requires an employer to pay an employee who is a manual worker on a weekly basis, no later than seven calendar days after the end of the week in which the wages are earned. In addition, Plaintiffs allege that Defendants violated *Section 193 of New York Labor Law* in that Defendants allegedly deducted and retained for themselves 5% of the monies to be paid to Plaintiffs as [*10] wages. Lastly, Plaintiffs allege that Moving Defendants contracted with the Contractor Corporations, within the meaning of *New York Labor Law Section 345-a*, and that Moving Defendants knew, or

should have known with the exercise of reasonable care or diligence, of the Contractor Corporations' failure to comply with the provisions of New York Labor Law that govern the payment of wages and minimum wages.

Based on these allegations, Plaintiffs seek: a judgment declaring that Defendants violated Plaintiffs' rights under *29 U.S.C. §§ 206* & *207*, Title 12 of the NYCRR Section 142-2.2, and *New York Labor Law Sections 191*, *193* and *652*; a judgment declaring that Liberty, Nigri and/or Laniado are liable for the Contractor Corporations' alleged violations of New York Labor Law; a judgment against Defendants jointly and severally for damages in the amount of the unpaid minimum wages and overtime compensation under New York Labor Law and the FLSA as liquidated damages; an additional amount as liquidated damages equal to 25% of the total amount of the wages due each plaintiff under New York Labor Law; prejudgment interest; costs, disbursements and reasonable attorney's fees; [*11] and such other relief as may be just and proper.

Moving Defendants neither dispute nor concede that Plaintiffs were not paid in accordance with the relevant state and federal statutes. Instead, Moving Defendants argue that Plaintiffs were not employed by Moving Defendants and that Moving Defendants did not exert any control over Plaintiffs. Moving Defendants argue that such facts remove them from coverage of the FLSA, NYCRR and New York Labor Law, thereby leaving no genuine issue of material fact for trial. Accordingly,

the Court must determine whether Moving Defendants fall within the definition of "employer" under the FLSA, NYCRR and New York Labor Law, and if not, whether there are any remaining claims.

C. *Statutory Framework*

Section 216(b) of the FLSA provides that:

> Any employer who violates the provisions of *section 206* or *section 207* of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . .

29 U.S.C. P 216(b). An "employer" is defined as "any person acting [*12] directly or indirectly in the interest of an employer in relations to an employee . . . ." 29 U.S.C. P 203(d). The statute further provides that where an individual may stand in the relation of an employee to two or more employers at the same time, whether the situation is one of "joint employment" is to be determined by the facts of the particular case. Specifically,

> if all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the

> other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the work week is considered as one employment for purposes of the act.

29 C.F.R. § 791.2(a) [*13]. In order to determine whether a joint employment situation exists, a court should consider whether there is an arrangement between the employers to share the employees' services, such as interchanging employees, whether one employer is acting directly or indirectly in the interest of the other employer in relation to the employees, and whether the employers are not completely disassociated with respect to the employment and may be deemed to share control of the employee, either directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under the control of the other employer. *29 C.F.R. § 791.2.*

New York Labor Law Section 345-a provides that:

> a manufacturer or contractor who contracts or subcontracts with another manufacturer or contractor for the performance of any apparel industry service . . . and so knew or should have known with the exercise of

> reasonable care or diligence of such other manufacturer's or contractor's failure to comply . . . shall be liable for such failure . . . . The exercise of reasonable care or diligence by a manufacturer or contractor shall be presumed if, prior to the execution of such [*14] contract or subcontract, and annually thereafter, such manufacturer or contractor receives from the department written assurance of compliance with section three hundred forty-one of this article.

N.Y. Labor Law § 345-a-1, *2*. The apparel industry is defined as the "making, cutting, sewing, finishing, assembling, pressing or otherwise producing, by any of the foregoing apparel industry services, any men's, women's, children's or infants' apparel. . . ." *N.Y. Labor Law § 340(c)*. A manufacturer is defined as any person who ". . . contracts with a contractor to perform in New York state the cutting, sewing, finishing, assembling, pressing or otherwise producing any . . . apparel . . . ." *N.Y. Labor Law § 340(d)*. The questions before the Court, therefore, are whether Moving Defendants are employers withing the meaning of the FLSA, NYCRR and New York Labor Law and whether they are therefore liable under either federal or state law.

III. STANDARD

The Court's role in a motion for summary judgment is not to resolve disputed issues of fact but to determine whether there are any genuine issues of material fact for trial. *See Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505, [*15] (1986). *Federal Rule of Civil Procedure 56(c)* provides that summary judgment is appropriate:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). When viewing the evidence, the Court must "assess the record in the light most favorable to the non-movant" and resolve all ambiguities and "draw all reasonable inferences in its favor." *Anderson*, 477 U.S. at 255; *American Casualty Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 728 (2d Cir. 1994); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177 (2d Cir. 1990).

The movant bears the initial burden of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the movant meets this burden, the party opposing the motion must come forward with specific evidence demonstrating the existence [*16] of a genuine dispute of material fact. *Fed. R. Civ. P. 56(e)*; *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 323-24. Where the non-movant "propounds a reasonable conflicting interpretation of a material disputed fact," summary judgment is inappropriate. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9-10 (2d Cir. 1983).

Conversely, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. *Casey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991); *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990).

An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and such contested facts are material to the outcome of the particular litigation if the substantive law at issue so renders them. *Anderson*, 477 U.S. at 248. "If, as to the [*17] issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the non-moving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Only when it is apparent that no rational trier of fact "could find in favor of the nonmoving party because the evidence to support its case is so slight" should a court grant summary judgment. *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2d Cir. 1994).

IV. DISCUSSION

A. *The FLSA and NYCRR Claims*[3]

As a preliminary matter, the Court finds that Nigri and Laniado's alleged lack of operational control over the [*18] non-moving Defendants is not dispositive on the issue of whether they may be individually liable under the FLSA. The fact that Nigri and Laniado may not have had "direct control over the [employees] . . . ignores the relevance of the totality of the circumstances in determining . . . operational control . . ." *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999). Accordingly, the Court will examine Nigri, Laniado and Liberty's alleged liability under the FLSA jointly.

In order for a party to be held liable under the FLSA, a person must be an employer within the meaning of the statute. Although the Supreme Court has emphasized that courts should interpret the provisions of the FLSA expansively, an alleged employer must, at a minimum, possess the power to control the workers in question. *Id.* at 139 (citing *Carter v. Dutchess Community Collete*, 735 F.2d 8, 12 (2d Cir. 1984)); *see also* 29 C.F.R. § 791.2. When determining whether a party possesses such control, a court should examine the "economic reality" presented by the facts of each case. *Goldberg v.*

[3] NYCRR Section 142-2.2 requires an employer to pay an employee overtime at a wage rate of 1.5 times the employee's regular rate pursuant to the FLSA. For the purposes of this opinion therefore, the same analysis applies for both the FLSA and NYCRR.

Whitaker House Coop., 366 U.S. 28, 33, 6 L. Ed. 2d 100, 81 S. Ct. 933 (1961). [*19]

The parties suggest differing tests to determine the economic reality of the instant case. Plaintiffs argue that the interpretation set forth in *Lopez v. Silverman*, 14 F. Supp.2d 405, 413-418 (S.D.N.Y. 1998), should apply, while Moving Defendants argue that the *Carter* interpretation of the economic reality test is controlling. In its 1984 opinion in *Carter*, the Second Circuit weighed four factors, stating that a court should consider "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter*, 735 F.2d at 12 (citation omitted). A far more expansive test was later applied in *Lopez*.[4] However, this Court declines to follow *Lopez* because the interpretation of the economic reality test, originally set forth in *Carter*, was reaffirmed

[4] The factors applied in *Lopez* are: (1) the extent to which the work is a discrete line-job forming an integral part of the joint employer's integrated process of production; (2) whether the joint employer's premises and equipment were used for the work; (3) the extent to which the employees' work is performed for the putative employer; (4) permanence or duration of the working relationship with the putative joint employer; (5) the joint employer's degree of control over workers; (6) whether responsibility under the contract with the putative joint employer passes without material changes between potential joint employees; (7) whether workers had a business organization capable of shifting as a unit between employers; and (8) additional factors. *Lopez*, 14 F. Supp. 2d at 420-22.

by the Second Circuit in a 1999 case, *Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999).

[*20] Turning to the first prong of the economic reality test, the Court finds that there is no genuine issue of material fact regarding whether Moving Defendants had the power to hire or fire Plaintiffs. Indeed, in Plaintiff's opposition to Moving Defendants' motion for summary judgment, Plaintiffs never dispute this fact, and merely claim that the assertions by the Moving Defendants that they did not hire, fire, pay or give assignments to Plaintiffs do not refute Plaintiffs' economic dependence upon the Moving Defendants. Pl.'s Mem. in Opp., at 13.

With respect to the second prong, whether Moving Defendants supervised and controlled employee work schedules or conditions of employment, the Court finds that Moving Defendants did not exercise such control to an extent that is relevant to this analysis. First, there is no suggestion in the record that Moving Defendants controlled employee work schedules by setting their hours or by deciding which days of the week the Plaintiffs were to work. Second, although the parties agree that Liberty's quality control person actually visited the factories to inspect the appearance and quality of the garments, there is no evidence of the fact that the [*21] quality control person influenced the Plaintiffs' work environment or conditions by requiring or prohibiting that certain amenities or fixtures be available.

Similarly, the fact that Liberty paid Yam at piece rates, and that Yam, in turn, paid Plaintiffs at piece rates, does not support the conclusion that Liberty or Moving Defendants exercised control over the rate and method of payment. Moving Defendants neither directly paid Plaintiffs nor signed Plaintiffs' checks, which is a key question when making such determination. *See Herman*, 172 F.3d at 140. Further, there is no suggestion in the record that Moving Defendants directly maintained or were in any way involved in the maintenance of Plaintiffs' employment records.

Plaintiffs' suggestion that the contractual relationship between Liberty and Yam amounted to "indirect influence" over such employment decisions and conditions is unpersuasive. Further, even assuming that some "indirect influence" existed, for the Court to hold that any such influence, under the specific facts of this case, is tantamount to the type of power enjoyed by an employer, would permit an extraordinarily broad definition of employer, even [*22] considering the expansive view taken with respect to the FLSA.

The Supreme Court has held that, "there may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 91 L. Ed. 1772, 67 S. Ct. 1473 (1947). Considering the totality of the circumstances presented by the particular facts of this case, it is clear to the Court that Moving Defendants were not employers within the meaning of the FLSA or NYCRR. *Id.* at

730. Accordingly, Moving Defendants' motion for summary judgment on this issue is GRANTED and Plaintiffs' motion is DENIED.

B. *New York Labor Law Claims*

Moving Defendants also move to dismiss all of Plaintiffs' claims under New York Labor Law, arguing only in a footnote to Nigri's affidavit, that the basis for dismissal of those claims is identical to the basis for dismissal of the federal claims. Nigri Aff. P 3 n.1. Unlike the FLSA however, New York Labor Law has provided for the liability of manufacturers or contractors if they knew, or should have known with the exercise of reasonable care or [*23] diligence, of such other manufacturer or contractor's failure to comply with Articles 6 or 19, which govern the payment of wages and minimum wages. *N.Y. Labor Law § 345-a.*

Plaintiffs argue that Moving Defendants must have been fully aware of the limited range within which Plaintiffs' wages fell, because the price that the Moving Defendants paid to the Contracting Corporations would have acted as an absolute ceiling or cap to Plaintiffs' wages. They point out that Moving Defendants admitted that the Contracting Corporations were paid by the garment or piece and never disputed that Plaintiffs were paid by the piece. Deposition of Albert Nigri [Nigri Depo.], Exh. A of Reif Decl., at 67-68 (discussing the prices paid per garment and using $ 1.80, $ 2.00 and $ 3.50 as examples); Zheng Decl. P 3; Yang Decl. PP 2-3. Moreover, they draw this Court's attention

to the following facts: (1) Moving Defendants admitted that they placed time constraints on the Contracting Corporations by requiring work to be completed by certain deadlines; and (2) Liberty representatives visited the factory premises to inspect the quality of the garments and also to "make certain that Liberty's garments were [*24] being processed in a timely fashion." Nigri Depo. at 62-63; Nigri Aff. P 13. Plaintiffs argue, that as a result, Moving Defendants must have known how many workers were employed by the Contracting Corporations as well as the number of hours they were working to complete the work. Based on the foregoing, Plaintiffs suggest that Moving Defendants could have easily figured out how much Plaintiffs were being paid by a simple mathematical calculation. They therefore ask the Court to draw the conclusion that Moving Defendant knew or should have know with reasonable care and diligence that Plaintiffs were not making minimum wage or being paid overtime.

These arguments however do not amount to the necessary showing of evidence for purposes of prevailing on Plaintiffs' summary judgment motion. The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Instead however, Plaintiffs have offered sufficient evidence to create a reasonable conflicting interpretation of a material disputed fact.

As stated earlier, Moving Defendants have never disputed [*25] that Plaintiffs were not paid in

accordance with the relevant state statutes. Moreover, Plaintiffs have submitted affidavits to substantiate their claims that they were not in fact paid wages that they were due. Zheng Decl. P 3; Yang Decl. PP 2-3. In addition, one Plaintiff swears that she complained many times to Liberty representatives that the workers were not being paid. Zheng Decl. P 8. The only evidence that Moving Defendants offer to refute that sworn affidavit is Nigri's affidavit stating that the quality control person was instructed not to speak to the workers. Moving Defendants do not submit a single affidavit by the representatives in charge of quality control stating that they did not actually speak with the workers or hear Plaintiff's complaints that the workers were not being paid.

If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the non-moving party, summary judgment is inappropriate. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Here, Moving Defendants devoted very little space or effort in arguing the New York [*26] Labor Law claims, perhaps based on the erroneous assumption that these claims were the same as the FLSA claims. Moving Defendants never argued that they did not know how much Plaintiffs were being paid, merely that they did not pay them. Plaintiffs, however, have presented sufficient evidence to create an issue of fact about whether Moving Defendants knew or should have known how much Plaintiffs were being paid. Based on evidence of the following

facts: that Liberty paid the Contracting Corporations by the piece; that they set firm deadlines by when the garments needed to be completed; that Liberty representatives visited the factory and saw the workers who stitched and finished the garments; and that one Plaintiff complained about the workers' wages; it is not apparent that no rational trier of fact could find in favor of the nonmoving party because the evidence to support its case is so slight.

Moving Defendants have stated that Liberty, a manufacturer, contracted with Yam to perform services including sewing, cutting, and finishing patterns for Liberty. Nigri Aff. P 9. It is therefore clear from the record that Moving Defendants are the types of entities that would be covered by [*27] *Sections 345-a(1)* and *340(c)*, and that the definition of employer under the FLSA is inapplicable in this context.

For all these reasons, this Court concludes that Plaintiffs have presented sufficient evidence to defeat Moving Defendants' motion for summary judgment on the New York Labor Law claims. Accordingly, both Moving Defendants' and Plaintiffs' motions for summary judgment on the New York Labor Law claims are DENIED.

C. *Pendent Jurisdiction*

A district court retains the discretion to exercise pendent jurisdiction and entertain state law claims once all federal claims have been dismissed, *see Enercomp, Inc. v. McCorhill Publ'g*, 873 F.2d 536, 545 (2d Cir.1989). "Needless decisions of state law

should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). Because it appears that as of yet, no state court has interpreted *section 345-a of New York Labor* [*28] *Law*, this Court declines to exercise supplemental jurisdiction over Plaintiff's pendent state law claims.

V. *CONCLUSION*

For the reasons stated above:

Moving Defendants' motion for summary judgment on Plaintiffs' claims under the FLSA and NYCRR is GRANTED, and such claims are hereby DISMISSED;

Moving Defendants' motion for summary judgment on the New York Labor Law claims is DENIED;

Plaintiffs' motion for summary judgment is DENIED;

Plaintiffs' New York Labor Law claims are dismissed without prejudice.

The Clerk of the Court is hereby directed to mark this action closed.

Dated: March 12, 2002
New York, New York

SO ORDERED:
Richard Conway Casey, U.S.D.J.

185

(3)

Supreme Court, U.S.
FILED
MAR 31 2011
OFFICE OF THE C.

No. 10-1086

IN THE

Supreme Court of the United States

LIBERTY APPAREL COMPANY, INC., et ano.,

Petitioners,

v.

LING NAN ZHENG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JAMES REIF
Counsel of Record
GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, 6th Floor
New York, New York 10003
(212) 228-7727
jreif@grmny.com

Counsel for Respondents

235512

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the substantive issue they raise concerning determination of the existence of a joint employment relationship under the Fair Labor Standards Act ("FLSA") was settled by this Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), the Second Circuit's Summary Order upholding the finding of joint employment was fully consistent with *Rutherford Food* and with the decisions of other Courts of Appeals, and Petitioners failed to present in trial or post-trial proceedings or on their appeal to the Second Circuit the issue they raise now in the Petition?

II. Whether Petitioners have presented compelling reasons to grant the Petition where the procedural issue they raise, whether the District Court erred in submitting to the jury determination of the issue of joint employment, was effectively settled by this Court's precedents and the Second Circuit's Opinion upholding submission to the jury of the joint employment determination was fully consistent with those precedents and the decisions of other Courts of Appeals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	8
I. Whether Determination of the Existence of a Joint Employment Relationship Under the FLSA Should Be Made Exclusively by Consideration of the Four Factors on Which Petitioners Would Rely Was Settled by this Court in *Rutherford Food*	8
II. The Second Circuit's Rulings on the Joint Employment Issue Are Consistent with *Rutherford Food*	10
III. The Second Circuit's Rulings Are Consistent with the Decisions of Other Courts of Appeals	11
IV. Petitioners Failed to Raise in Trial or Post-Trial Proceedings or on Their Appeal to the Second Circuit the Substantive Issue They Now Raise in the Petition	16

Table of Contents

Page

V. This Court's Precedents Have Settled Whether the District Court Was Compelled to Decide Itself Whether Respondents Were Employed by Petitioners 20

VI. The Second Circuit's Opinion Upholding Submission to the Jury of the Issue Whether Respondents Were Employed by Petitioners was Fully Consistent with the Decisions of this Court. 22

VII. There Is No Conflict Between the Second Circuit's Opinion and the Decisions Cited by Petitioners. 23

CONCLUSION 25

labor laws (and unionization). The prolonged strikes by New York City garment workers in 1909 and 1910, coupled with the infamous fire at the Triangle Shirtwaist factory in 1911, led to demands for reform of the garment industry. The New York Legislature created the Factory Investigation Committee which produced proposals for legislative reform which sought to impose responsibilities on garment manufacturers, as the employers of the workers who sewed and assembled their garments. In response, manufacturers undertook to contract out to a contractor the sewing/assembly work, in an attempt to create a process of production which might allow them to claim that they were not the employers of the workers sewing and assembling their garments and, so, did not have any responsibilities to those workers as an employer. By the 1920s, this practice had become the dominant method in the industry for sewing and assembling women's garments. (This history of outsourcing in the garment industry and the resultant conversion of most garment manufacturers into "jobbers" is well-known. *See Abeles v. Friedman*, 171 Misc. 1042, 14 N.Y.S.2d 252, 255-56 (N.Y. Sup. Ct. 1939).)

In the 1990s, as before, sewing/assembly was an integral part of garment production and still could not be accomplished without the use of manual labor. Garment remained a "cutthroat" industry, and labor costs were the most significant component of garment production. Petitioners' expert conceded that attempted evasion of labor laws (to reduce labor costs) still animated at least some garment manufacturers in the 1990s. And there was ample evidence that Petitioners did not contract out the sewing/assembly of their garments for any legitimate economic reason. First, contractors did not possess any sophisticated or expensive technology which was not

readily available to Petitioners directly. To the contrary, sewing and assembly of garments required only low-cost leasing of sewing machines and a pressing machine. Space for this phase of production was inexpensive due, in part, to New York City's creation of manufacturing zones, such as Chinatown and Sunset Park, Brooklyn, in which rents were capped specifically to attract manufacturing. Workers who sewed and assembled garments did not possess any specialized expertise or experience. Their work required minimal skill and was usually performed by immigrant women possessed of little or no formal education. Liberty's drafting of written specifications and instructions for the sewers/assemblers and the regular, extensive and direct supervision of Respondents' work by Liberty representatives, *see infra*, demonstrated that Petitioners knew well how the sewing/assembly was to be accomplished.

This was not a case where a manufacturer outsourced to a factory in an underdeveloped country or in some other region of the United States to gain access to sewers/assemblers who would work for materially lower wages than workers in the manufacturer's locale. The workers whom Petitioners used to sew/assemble their garments worked in the very same city in which Liberty's facilities were located. Moreover, in the late 1990s, there were between 4,000 and 4,500 garment contractors in New York City, which meant there were literally tens of thousands of garment workers who composed a large pool of cheap labor which was readily available to Petitioners to be hired as direct employees.

The evidence showed that Petitioners' rationale that they contracted out because of the cyclical nature of production was a pretext. Petitioners professed they did

not hire garment workers directly because they did not want to pay them for holidays or seasonal periods when there was little or no work. This ignored that Petitioners could readily do exactly what Yam did: lay off garment workers temporarily and bring them back when the next production cycle began. Virtually all of the Respondents who worked at the factory into late November or early December of a calendar year testified to being laid off temporarily in the Christmas/New Year period after production for the holiday season had crested and then being brought back by Yam in mid-January. Also readily available at the conclusion of such a down period were the tens of thousands of other garment workers in New York City who would have been essentially interchangeable with any worker who might not have returned from a temporary layoff.

Undisputed testimony established the "cutthroat" character of competition for work in the garment industry. This competition allowed Liberty effectively to control Respondents' rates of pay. It paid Yam by the piece, just as Yam paid Respondents by the piece. The evidence showed Yam possessed virtually no ability to influence the piece rates at which he was paid. Because Liberty used *30 to 40* contractors at any one time, Yam was faced with "negotiations" with Petitioners which, in essence, consisted of being told: 'Take it or leave it.' If Yam did not accept the piece rate quoted by Petitioner Nigri, Petitioners simply took the job at the quoted price to any of its dozens of other contractors. As Respondents' expert, a former wage and hour investigator for the U.S. Department of Labor who specialized in the garment industry, put it:

> [I]t is almost as if the contractor was an employee or worker looking for a job....[I]t was a one-sided negotiation thing where the jobber dictated, this is what I'll pay for this. You interested, take it. Not interested, leave it.

Each of Liberty's other contractors was under the same economic coercion. And waiting behind those contractors, likewise eager for work, were another 4,000 to 4,500 contractors.

Liberty had to meet deadlines regularly set by its retail customers on individual jobs. Liberty was so certain of its ability to quickly outsource sewing/assembly at an acceptable cost that it completed virtually all pre-factory production on a job even before the job was outsourced. Indeed, it did not even need to seek out contractors to handle jobs: contractors showed up at the Liberty office/warehouse in Brooklyn on their own initiative "on a daily basis" looking for work. In these circumstances, Liberty virtually dictated the prices it paid for its jobs.

Yam could not long survive if his costs for sewing/assembling a garment exceeded what Liberty paid him for that work. Because he was paid by Liberty by the piece on a job-by-job basis and in turn paid Respondents at piece rates for their work on a Liberty job, Yam was able to insure that the piece rates he paid in the aggregate were below the piece rate paid to him. If Liberty paid Yam $3 per piece on a job, Yam would set the piece rates he paid workers for sewing/assembling so that, in the aggregate, they would not exceed $3, regardless how many hours those workers spent performing their work on that job. The piece rate paid by Liberty on a particular garment,

effectively dictated by it, thus operated as a cap on the piece rates paid to the workers sewing/assembling that garment.

Because Respondents worked more than 85 hours per week and 70%-80% of their work was on Liberty garments, their overtime work obviously was predominantly for Liberty. This was further shown by the instances where Liberty representatives sought to induce Respondents to work beyond even their regular hours with the promise of pay for unremunerated past work if a particular Liberty job was completed immediately. More significantly, as a precondition to obtaining Liberty work, Yam was required to sign a preprinted Liberty form promising completion of each job within 7 days of delivery of materials and instructions and acknowledging he was subject to a substantial monetary penalty if he failed to meet the deadline. The short deadline coupled with the threat of penalty, Yam's incentive to take on as much work as he could obtain, arising from his being paid by the piece, and the fact that neither Yam's "profit" nor the workers' pay was impacted by the number of overtime hours worked in order to complete a job (because sewers/assemblers were not paid by the hour), ineluctably forced Yam to require Respondents to work exorbitant overtime hours as a matter of course. Occasionally, Yam's need to finish a Liberty job by an imminent deadline, in order to avoid a penalty, resulted in Respondents having to work through an entire night.

Petitioners regularly, extensively and directly supervised Respondents' work on their garments in a manner indistinguishable from the control exercised by Yam, Respondents' direct employer. Liberty

representatives roamed the factory floor freely, often alone, three or four times per week, often for hours at a time. They literally stood over Respondents' shoulders at their individual work stations, watching them sew/assemble Liberty garments, inspecting Respondents' work product and often speaking directly to them. These communications were not merely to develop "personal contact" or "rapport." They were one-way communications in which Liberty representatives ordered Respondents to make corrections on Liberty's garments and sometimes even instructed them on how to perform their work. On at least one occasion, a Liberty representative actually directed a Respondent and other workers to stop work on another manufacturer's garments and to work instead on Liberty garments, a directive with which they complied.

In sum, Petitioners exerted functional control over Respondents' wages, hours and other terms and conditions of employment.

REASONS FOR DENYING THE PETITION

The 2010 Summary Order and Opinion of the Second Circuit do not conflict with a decision of this Court or of any Court of Appeals nor do they implicate an important question of federal law that has not been, but should be, settled by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling" reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Whether Determination of the Existence of a Joint Employment Relationship Under the FLSA Should Be Made Exclusively by Consideration of the Four Factors on Which Petitioners Would Rely Was Settled by this Court in *Rutherford Food*.

The FLSA defines employment with "striking breadth." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Title 29 U.S.C. § 203(g) provides: "'Employ' includes to suffer or permit to work." This is "the broadest definition [of 'employ'] that has ever been included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black).[1] It encompasses "working relationships, which prior to [the FLSA] were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *accord*: *Darden*, 503 U.S., at 526 (§ 203(g) "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

---

1. Then-Senator Black was the principal sponsor of the so-called Black-Connery bill which became the FLSA.

Petitioners say that, in determining whether they employed Respondents jointly with a contractor within the meaning of the FLSA, the only circumstances which should be considered are whether they had the power to hire and fire Respondents, supervised or controlled their work schedules or conditions of employment, determined their pay rates and method of payment and maintained records of their hours worked and pay. But whether the existence of a joint employment relationship under the FLSA should be determined exclusively by a consideration of those factors (hereinafter "the four factors") was settled in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). A meat processing company had engaged a contractor-middleman to hire workers to bone the company's meat. The parties agreed the boners were employed by the contractor but the question was whether they were also employed by the company. This Court explicitly rejected the company's contention that this question could be answered by consideration of limited, individual factors, holding that determination of an employment relationship between the company and the boners depended instead "upon the circumstances of the whole activity." *Id.*, at 730. The Court upheld the Tenth Circuit's finding that the boners were also employees of the company notwithstanding that the contract between the company and the middleman provided that the latter would have "complete control" over the boners "who would be his employees," *id.*, at 725, and notwithstanding that the company did not hire or pay the boners nor directly determine their wages, hours or assignments. The Court's opinion paid no attention to whether the company had maintained records of the boners' hours worked or their pay. *Rutherford Food* effectively answered (in the

negative) the issue Petitioners now raise in the Petition. *See* Pet. App. at 66a, 71a (any contention that joint employment relationship under the FLSA determined exclusively by consideration of the four factors inconsistent with *Rutherford Food*).

The question whether workers hired by an outside contractor to sew/assemble the garments of a manufacturer are employed by the manufacturer, as well as the contractor, for purposes of the FLSA is not the recurrent issue Petitioners imply it is. *Compare* Petition at 17. More than seven years after the Second Circuit's 2003 decision reinstating Respondents' complaint, this remains the only case in which an appellate court has been presented with this issue. And research has uncovered but a single case filed after that 2003 decision, to wit, *Chen v. Cache*, No. 10 Civ. 517 (PKC) (S.D.N.Y.), in which one or more garment workers hired by an outside contractor to sew/assemble a manufacturer's garments brought claims against the manufacturer under the FLSA (or other statute using the same definition of "employ") on the basis of a contention that the manufacturer was also their employer. *Chen* settled shortly after it was filed.

II. The Second Circuit's Rulings on the Joint Employment Issue Are Consistent with *Rutherford Food*.

In its 2003 opinion, the Second Circuit expressly disapproved the lower court's resolution of the first summary judgment motion based exclusively on a consideration of the four factors. (*Id.*, at 54a, 65a-66a, 67a). It reiterated this Court's admonition in *Rutherford Food* that determination of a joint employment relationship is

dependent upon a consideration of all factors which may be relevant to that determination in a given case. *See id.*, at 71a, 81a. In remanding for reconsideration of the issue of joint employment, the Circuit identified various factors it thought the lower court would find "illuminating" in the circumstances of this case and expressly noted these factors were "drawn from *Rutherford*." (*Id.*, at 72a). The District Court's instructions to the jury closely tracked the Circuit's opinion. And the Circuit's 2010 Summary Order upholding the jury's finding of a joint employment relationship (*id.*, at 8a) likewise was consistent with *Rutherford Food*. In short, it is not the Second Circuit's judgment which conflicts with *Rutherford Food* but, rather, the position asserted by Petitioners in the Petition.

III. The Second Circuit's Rulings Are Consistent with the Decisions of Other Courts of Appeals.

Petitioners contend there is a conflict between the Second Circuit and one or more other Circuits regarding the standards for determining the existence of a joint employment relationship under the FLSA. The conflict posited in the Petition is one between the Second Circuit's *2003* decision and a decision of another Circuit. In any event, both the 2003 decision and the 2010 Summary Order are consistent with the decisions of other Circuits.

Petitioners argue the 2003 opinion is at odds with the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). But the predicate for that argument, Petitioners' insistence that the Court of Appeals in *Bonnette* held that determination of a joint employment relationship under the FLSA is to be based exclusively upon a consideration of the four

factors, is clearly incorrect. *Bonnette* presented the question whether persons who provided in-home care to disabled public assistance recipients were employed for purposes of FLSA by the recipients alone or also by state and county welfare agencies who were the defendants. The District Court "looked in particular" to the four factors set forth above but at the same time "acknowledg[ed] that its determination must be based on 'a consideration of the total employment situation and the economic realities of the work relationship.'" *Id.*, at 1470 (quoting District Court). In affirming the lower court's finding that the public agencies employed the case workers, the Ninth Circuit squarely rejected the narrow approach urged by Petitioners:

> The four factors considered by the district court provide a useful framework for analysis in this case, *but they are not etched in stone and will not be blindly applied. The ultimate determination must be based "upon the circumstances of the whole activity.*"

Id. (emphasis added), quoting *Rutherford Food.*

Similarly, in *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997), the Ninth Circuit noted that a court "should consider *all* those factors which are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA." (Emphasis added, internal citation omitted). The Court held that cucumber pickers were employed under the FLSA and the Migrant and Seasonal Agricultural

Worker Protection Act ("AWPA")[2] by both a farm labor contractor and a grower, despite the fact that the grower-contractor contract provided that it was the contractor who was responsible for supervising the pickers and despite the facts that the grower did not hire or pay the pickers nor directly determine their hours or rates of pay. The Ninth Circuit reached that conclusion without considering whether the grower maintained records of the workers' pay or hours worked.

That the Second Circuit's approach is consistent with the Ninth Circuit's is shown by the Second Circuit's 2003 opinion and, in particular, by the discussion therein of *Carter v. Duchess Community College*, 735 F.2d 8 (2d Cir. 1984). In *Carter*, a district court granted summary judgment dismissing FLSA claims by a prisoner who had performed work for a college. Noting that the defendant had exercised most of the "typical employer prerogatives" encompassed by the four factors discussed in *Bonnette*, *id.*, at 14-15, the Second Circuit reversed the summary judgment and remanded. In the instant case, the Circuit explained its *Carter* opinion:

---

2. The term "employ" has the same meaning under the AWPA as under the FLSA. (29 U.S.C. § 1802(5)). Title 29 C.F.R. § 500.20(h)(4)(i), promulgated by the U.S. Department of Labor under the AWPA, provides: "A determination of whether the employment is to be considered joint employment depends upon *all* the facts in the particular case." (Emphasis added). Title 29 C.F.R. § 500.20(h)(4)(ii) provides a *non-exhaustive* list of factors to consider in identifying a joint employment relationship. ("The factors considered significant by the courts in [determining a joint employment relationship] include, but are not limited to, the following...").

> In rejecting the district court's conclusion that they could not be considered employees as a matter of law, we did not purport to identify all factors that could bear on the employer status question. Instead, we stated that the economic reality test "*include[s]*" an inquiry into the four factors."

(Pet. App. at 70a) (emphasis in original). *Carter*, like *Bonnette*, "stands solely for the proposition that" the four factors "can be *sufficient* to establish employer status" and "did not hold...that those factors are *necessary* to establish an employment relationship." (*Id.*, at 71a) (emphasis in original); *see also id.*, at 63a ("[W]e have never suggested that, in analyzing joint employment, the four factors alone are relevant and that other factors that bear on the relationship between workers and potential joint employers should be ignored.").

The District Court was instructed to determine whether Respondents were employed by Petitioners "based on 'the circumstances of the whole activity.'" *Id.*, at 72a, quoting *Rutherford Food*. The Second Circuit identified several factors "drawn from *Rutherford*" which it thought the lower court would find "illuminating" in the circumstances of this case. *Id.*, at 72a-73a. The Court said these factors were "pertinent" but "nonexclusive." *Id.*, at 72a, 81a. On remand, the District Court was "free to consider any other factors it deems relevant to its assessment of the economic realities." *Id.*, at 72a; *accord*: *id.*, at 81a (determination of joint employment relationship must be "based on the totality of the circumstances").

Like the Second and Ninth Circuits, other Circuits have likewise affirmatively held or noted, often on more than one occasion, that *all* factors relevant to an assessment of the economic reality are properly considered when determining the existence of a joint employment relationship under the FLSA. *See, e.g., Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1998); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237, 238 (5th Cir. 1973); *Schultz v. Capital Int'l Security, Inc.*, 466 F.3d 298, 306 (4th Cir. 2006); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675, 676 (1st Cir. 1998).[3] And, again like the Second and Ninth Circuits, these Circuits have relied on numerous factors other than or in addition to the four factors in finding an employment relationship or in overturning a judgment rejecting an employment relationship, even where the defendant did not hire or pay workers or directly determine their wages or hours and where the Circuit did not consider whether the defendant maintained records of the workers' wages and hours. *E.g., Antenor*, 88 F.3d, at 927-28, 938; *Griffin & Brand*, 471 F.2d, at 236-37. No Circuit has held that the existence of a joint employment relationship under the FLSA must be determined exclusively by consideration of the four factors on which Petitioners would rely.

---

3. Petitioners cite *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995). *Cole* involved the question whether an individual was an employer within the meaning of 29 U.S.C. § 203(d), not whether a company employed workers within the meaning of 29 U.S.C. § 203(g). In any event, in answering the question posed in *Cole*, the Sixth Circuit did not hold that a court could consider only the four factors.

In finding or upholding a finding of a joint employment relationship or in holding that a plaintiff was entitled to a trial on a claim dependent on a joint employment relationship, the Circuits have discussed varying configurations of factors. In some cases, courts have held that certain factors alone were sufficient to establish a joint employment relationship under the FLSA or the right to trial on that issue. In such cases, it was unnecessary to consider other factors which might also have been relevant. *E.g.*, *Carter* and *Bonnette*, *supra*. Elsewhere, the number and/or nature of the factors considered in determining the existence of a joint employment relationship turned on the industry involved or on the other particular circumstances in a given case. None of these rulings created a conflict between Circuits as to how to determine the existence of a joint employment relationship under the FLSA. Rather they reflected an unexceptional concern by each of these courts for the particular facts and circumstances which may have been relevant in a given case and/or for the procedural context in which the joint employment issue arose.

IV. Petitioners Failed to Raise in Trial or Post-Trial Proceedings or on Their Appeal to the Second Circuit the Substantive Issue They Now Raise in the Petition.

Although nominally seeking review of the Second Circuit's August, 2010 judgment, the Petition reads as if Petitioners seek review of the judgment of the Court of Appeals on the 2003 appeal. But subsequent to that appeal and to the 2008 denial of Petitioners' second motion for summary judgment (Pet. App. at 20a), a jury trial was held on Respondents' claims and judgment for

Respondents entered on the basis of the jury verdict. In these circumstances, Petitioners may not appeal the 2008 order denying summary judgment nor the 2003 vacatur of the summary judgment dismissing the complaint. *Ortiz v. Jordan*, 131 S. Ct. 884, 888-89 (2011).

As parties which/who were unsuccessful at the summary judgment stage, Petitioners were free to raise at trial any issue pertaining to Respondents' employment by Petitioners. However, as the trial record superseded the record on the summary judgment motions, *id.*, it was incumbent upon Petitioners to create a record in the course of the trial and post-trial proceedings and on their appeal on the issue whether Petitioners' employment of Respondents was to be determined solely on the basis of the four factors, if they wished this Court to consider that issue.

Petitioners repeatedly failed to do so. At no time prior to submission of Respondents' claims to the jury did Petitioners seek a jury instruction to the effect that their employment of Respondents was to be determined exclusively by consideration of the four factors. They neither suggested such an instruction nor objected to the District Court's proposed instructions on the factors which might be considered on the employment issue. To the contrary, Petitioners requested that the jury be charged that it should consider each of the six factors identified by the Second Circuit opinion as "pertinent," *see* Pet. App. at 72a-73a, and that it could consider three additional factors. Petitioners also requested the following charge:

> You should make this decision [whether Respondents were employed by Petitioners]

> by looking at the totality of the circumstances weighing in favor or against a finding of joint employment. In doing so you should consider the six factors listed above, the factors proposed by the parties, if you find them to be relevant, and any other factors you find to be relevant.[4]

While Petitioners made a motion prior to submission of the case to the jury for judgment as a matter of law, they did not argue that the sufficiency of the evidence on joint employment should be measured exclusively by consideration of the four factors. They thereby failed to comply with Fed. R. Civ. P. 50(a) which, by its terms, provides that such a motion "*must specify* the judgment sought and the law and facts that entitle the movant to the judgment." (Emphasis added). *See also Lambert v. Genesee Hosp.*, 10 F.3d 46, 53-54 (2d Cir. 1993) ("the specificity requirement is obligatory"). Similarly, in their post-verdict motion pursuant to Fed. R. Civ. P. 50(b) and 59, Petitioners failed to argue for JMOL or a new trial on the basis that Respondents had introduced insufficient evidence of joint employment if measure exclusively by the four factors or that the District Court had failed to instruct the jury that the existence of a joint employment relationship should have been determined solely on the basis of the four factors.[5] In these circumstances,

---

4. A verdict form proposed by Petitioners would have had interrogatories submitted to the jury on the presence or absence of each of the six factors identified by the Second Circuit as "pertinent" and on the weight to be ascribed to each of those factors.

5. Petitioners' failure to properly raise this issue on their Rule 50(a) motion for JMOL would have prevented them from obtaining

Petitioners were foreclosed from arguing on appeal that they were entitled to JMOL due to lack of sufficient evidence of a joint employment relationship when measured exclusively by the four factors or to a new trial on the ground that the judgment entered in the wake of the jury verdict was improperly infected by consideration of factors other than or in addition to the four factors. *See Unitherm Food Systems, Inc. v. Swift-Eckrich*, 546 U.S. 394, 404 (2006).

In any event, Petitioners did not make either of these arguments on their appeal, and the Second Circuit panel did not address them. After affirmance by the panel in August, 2010 of those parts of the judgment concerning the FLSA claims, Petitioners filed a petition for rehearing/rehearing *en banc*. However, they did not raise any argument to the effect that the District Court had erred in upholding the FLSA components of the judgment because those components were based on a finding of a joint employment relationship which was not made exclusively by consideration of the four factors.

In sum, the substantive issue set forth in the Petition is a free-floating question untethered to a motion or objection properly made at trial or in post-trial proceedings or to a contention advanced on Petitioners' appeal to the Second Circuit. Because, following the 2008 denial of summary judgment, Petitioners repeatedly failed to raise in the lower courts, and those courts did not consider, the

---

a post-verdict JMOL even had they moved under Rule 50(b) for JMOL on this ground. *E.g.*, *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 112 (2d Cir. 1996) (Rule 50(b) normally proscribes a post-verdict JMOL "on any ground not specifically raised in an earlier motion" under Rule 50(a)).

issue now presented in the Petition, that issue was not properly preserved for review by this Court. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("this is a court of final review and not first view") (internal quotation marks omitted); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (writ dismissed as improvidently granted where petitioner did not object to jury instruction concerning issue presented in petition and did not present that issue to Court of Appeals).

V. This Court's Precedents Have Settled Whether the District Court Was Compelled to Decide Itself Whether Respondents Were Employed by Petitioners.

Respondents had a right to trial by jury of their claims under the FLSA, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and Respondents properly exercised that right by timely making a demand for same. Respondents' employment by Petitioners was a necessary element of their FLSA claims under 29 U.S.C. §§ 206(a)(1) and 207(a)(1). *Cf.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006) (defendant's status as employer within meaning of Title VII necessary "element" of plaintiff's claim for relief). Thus, Petitioners were entitled to a jury trial on the issue of the existence of a joint employment relationship with each Petitioner.

In the District Court, Petitioners proposed resolving that issue by dividing it between the jury and the Court. Several factual questions as to the presence or absence of individual factors bearing upon the existence of a joint employment relationship and as to the weight to be ascribed to each of those factors would be submitted

to the jury. But after the jury answered each of those interrogatories, the Court, on the basis of the jury's answers thereto, would itself decide whether Respondents were employed by one or more of the Petitioners. *See* Pet. App. at 18a.

The Court rejected that approach. It submitted to the jury the determination of the issue whether Respondents were employed by each defendant within the meaning of the FLSA, by directing the jury to answer a single interrogatory: "Do you find that one or more of the defendants had functional control over the terms and conditions of employment?" The jury was directed to answer the interrogatory "Yes" or "No" for each defendant separately. The jury found Petitioners were employers of Respondents and that the third defendant, Laniado, was not. Petitioners claim this was error, that the Court was compelled to divide the issue between jury and Court as Petitioners had proposed, assigning to itself the "ultimate" question whether Respondents were employed by Petitioners.

Whether the District Court erred in submitting to the jury the issue whether Respondents were employed by Petitioners effectively has been settled by this Court. This issue clearly was a mixed question of law and fact, that is, it required determination of a set of facts followed by the application of a legal standard to the facts found. In *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), this Court held that "whether Greyhound possessed sufficient indicia of control to be an employer [under the National Labor Relations Act] is essentially a factual issue." And by proposing that determination of the issue whether Respondents were employed by Petitioners be split

between the jury and the Court, Petitioners effectively conceded that the issue was comprised of both factual and legal components.

This Court has held that mixed questions of law and fact "are peculiarly ones for the trier of fact." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). It explained why this is so in terms which directly refute Petitioners' proposal to divide the issue of employment between jury and court. "We must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination..." *Id.* The ultimate determination "requires delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *Id.* (footnote omitted). Accordingly, a mixed question of law and fact "has typically been resolved by juries." *U.S. v. Gaudin*, 515 U.S. 506, 512 (1995).

Thus the procedural question posed in the Petition has already been effectively resolved by this Court.

VI. The Second Circuit's Opinion Upholding Submission to the Jury of the Issue Whether Respondents Were Employed by Petitioners was Fully Consistent with the Decisions of this Court.

The Second Circuit observed, no doubt correctly in view of *Greyhound*, that whether Respondents were employed by Petitioners involved both determinations of facts and application of a legal standard to the factual determinations. *See* Pet. App. at 17a-18a. In upholding

submission to the jury of this mixed question of law and fact, the Second Circuit noted that "appellate courts rarely --if ever-- vacate for failure to use a special verdict form." (*Id.*, at 18a). *See also* 9B C. Wright & A. Miller, Federal Practice & Procedure § 2505 (3d ed. 2008) at 109-110 ("there appears never to have been a reversal on this ground"). Fed. R. Civ. P. 49(a) gives a district court ample, if not unreviewable, discretion not to require a jury to answer numerous interrogatories. Splitting determination of the existence of a joint employment relationship between the jury and the Court would have required a separating out of the interwoven elements of fact and law the difficulty of which would risk abridgment of Respondents' right to trial by jury. (Pet. App. at 19a). The record here provided no basis for departure from the "typical" resolution by a jury of a mixed question of law and fact. The Circuit's upholding of submission to the jury of the issue whether Respondents were employed by Petitioners was fully consistent with *Greyhound*, *TSC Industries* and *Gaudin*.

VII. There Is No Conflict Between the Second Circuit's Opinion and the Decisions Cited by Petitioners.

Petitioners contend the Second Circuit's affirmance of the District Court's submission to the jury of determination of the existence of a joint employment relationship conflicts with the decisions in *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), and *Johnson v. United Gov't of Wyandotte County*, 371 F.3d 723 (10th Cir. 2004). This contention is founded on a misreading of those cases.

In *Castillo*, a district court entered judgment for a defendant on claims under the FLSA based on the jury's

answers to nine special interrogatories. The plaintiffs appealed from the court's denial of their motion under Fed. R. Civ. P. 50(b) for judgment n.o.v. (now JMOL). 704 F.2d, at 183. The sole issue was whether the facts showed the plaintiffs were employees of the defendant. The Fifth Circuit held that because there were no unresolved issues of fact, the employment relationship "was established as a matter of law." *Id.*, at 187-88. In *Johnson*, the Tenth Circuit held only that where a jury had found the defendant did not employ the plaintiffs, it would review the denial of the plaintiffs' post-trial motion for JMOL only for sufficiency of the evidence and not *de novo*. 371 F.3d, at 728-29. *Castillo* and *Johnson* are thus plainly distinguishable. In neither did a Court of Appeals hold that a district court erred in submitting to a jury the issue of a plaintiff's employment by a defendant where, as in the present case, the evidence introduced at trial was sufficient for submission to the trier-of-fact. We also note that, in attempting to create a conflict between the Second and Tenth Circuits, Petitioners ignore *Bristol v. Bd. of County Comm'rs*, 312 F.3d 1213, 1221 (10th Cir. 2002) (*en banc*), where the Tenth Circuit held that, as a matter of law, the defendant board was not the plaintiff's employer but reaffirmed the "general rule" that "'determining whether an entity qualifies as an employer is a fact issue for the jury.'" (Internal citation omitted).

CONCLUSION

Petitioners have not established any compelling reasons for the Court to grant the Petition. Accordingly, Respondents request that the Petition be denied.

Respectfully submitted,

JAMES REIF
Counsel of Record
GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, 6th Floor
New York, New York 10003
(212) 228-7727
jreif@grmny.com

Counsel for Respondents

185 (2)

No. 10-1086

Supreme Court, U.S.
FILED
APR 11 2011

IN THE

United States Supreme Court

LIBERTY APPAREL COMPANY INC. and ALBERT NIGRI,

Petitioners-Appellees,

v.

LING NAN ZHENG, REN ZHU YANG, YUN ZHEN HUANG, WEN QIN LIN, SAI BING WANG, YE BIAO YANG, RONG YUN ZHENG, HUI FANG LIN, XIU YING ZHENG, JIN PING LIN, HUI MING DONG, YU BING LUO, SAU CHI KWOK, SAI XIAN TANG, YI ZHEN LIN, RUI FANG ZHANG, MEI JUAN YU, MEI YING LI, QIN FANG QIU, YI MEI LIN, MEI ZHU DONG, FUNG LAM, XIU ZHU YE, SING KEI LAM, and XUE JIN LIN,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Second Circuit

REPLY PETITION FOR A WRIT OF CERTIORARI

Vano I. Haroutunian
(Counsel of Record)
Brett Nadler
Avraham Z. Cutler
BALLON STOLL BADER & NADLER, P.C.
729 Seventh Avenue, 17th Floor
New York, New York 10019
212-575-7900

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
POINT I: THE RELEVANT FACTORS FOR JOINT EMPLOYMENT HAVE NOT BEEN DECIDED BY THIS COURT AND ARE A MATTER OF WIDESPREAD DEBATE BY THE CIRCUIT COURTS	2
A. *Rutherford* Did Not Address Joint Employment Under The FLSA	2
B. The Circuit Courts are Split on the Legal Standard To Be Applied in Determining Joint Employment and, Therefore, As To The Correct Decision in This Case	4
C. Respondents' Arguments Against *Certiorari* Rely on a Distortion of The Precise Question For Which Petitioners Seek *Certiorari*	9
POINT II: RESPONDENTS' ARGUMENTS AGAINST THE PETITION'S SECOND QUESTION FAIL TO REBUT THE CIRCUIT SPLIT OF WHETHER THE ULTIMATE ISSUE OF JOINT EMPLOYMENT IS A LEGAL ISSUE TO BE DECIDED BY THE DISTRICT COURT AND SUBJECT TO *DE NOVO* REVIEW	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: *Page(s)*

Barfield v. N.Y. City Health & Hosps. Corp., 537 F.3d 132 (2d Cir. 2008) 6,9

Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir. 1998) 3

Bogosian v. All Am. Concessions, 2008 U.S. Dist. LEXIS 78625 (E.D.N.Y. 2008) 9

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983..... 5,6,7,10,11

Bristol v. Bd. of County Commissioners, 312 F.3d 1213 (10th Cir. 2002)..... 14

Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983)..... 12,13

Chao v. Diversified Transfer & Storage, Inc., 2008 U.S. Dist. LEXIS 5634 (D. Mont. 2008) 6

Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 8

Dinkins v. Varsity Contractors, 2005 U.S. Dist. LEXIS 6732, 23 (N.D.Ill. 2005) 4

Jacobson v. Comcast, 2010 U.S. Dist. LEXIS 102834, fn.4 (D. Md. 2010) 6

TABLE OF AUTHORITIES

Cases: *Page(s)*

Johnson v. Unified Gov't of Wyandotte County/Kansas City,
371 F.3d 723 (10th Cir. 2004) 13,14

Kasten v. Saint-Gobain Performance Plastics Corporation,
563 U.S. ___ (2011) 8

Lepkowski v. Telatron Marketing Group,
2011 U.S. Dist. LEXIS 9388
(W.D. Pa. 2011) 4

Moldenhauer v. Tazewell-Pekin Consolidated Communications Center,
2006 U.S. Dist. LEXIS 93896
(N.D. Ill. 2006) 5

Morgan v. Speak Easy, LLC,
625 F. Supp. 2d 632, 649 (N.D.Ill 2007).. 4

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) 12

Rutherford v. McComb,
331 U.S. 722 (1947)..... 2,3,4,10

Schultz v. Capital Int'l Sec., Inc.,
466 F.3d 298 (4th Cir. 2006)..... 3

United States v. Haas,
623 F.3d 1214 (8th Cir. 2010) 12

TABLE OF AUTHORITIES

Cases: *Page(s)*

Zavala v. Wal-Mart Stores Inc.,
393 F. Supp. 2d 295 (D. N.J. 2005)..... 5

Zhao v. Bebe Stores,
247 F. Supp. 2d 1154 (C.D. Ca. 2003) 8

Zheng v. Liberty Apparel,
2002 U.S. Dist. LEXIS 4226
(S.D.N.Y. 2002) 5,6

Zheng v. Liberty Apparel Co.,
355 F.3d 61 (2d Cir. 2003)..... *passim*

Zheng v. Liberty Apparel,
556 F. Supp. 2d 284 (S.D.N.Y. 2008)..... 5

Zheng v. Liberty Apparel,
617 F.3d 182 (2nd Cir. 2010) 12

PRELIMINARY STATEMENT

Petitioners Liberty Apparel Company, Inc. and Albert Nigri ("Petitioners") submit this reply brief in support of their Petition for a Writ of Certiorari (the "Petition") to correct various errors and distortions contained in Respondents' Brief in Opposition to the Petition (the "Opposition Brief"[1]). The Opposition Brief distorts Petitioners' grounds for appeal, the relevant caselaw and the facts of the case.[2] Once these distortions are revealed, it is clear that, for the reasons stated in the Petition, this Court should grant the Petition.

---

[1]Citations to specific portions of the Opposition Brief shall be designated as "Op."

[2]As per Rule 10 of the this Court's rules, Petitioner will not address these distortions of the record because they seek a writ of *certiorari* based on circuit splits regarding important federal issues concerning: (a) the standard for joint employment under the FLSA; and, (b) whether the ultimate issue of joint employment is an issue of law which should be determined by a judge and subject to *de novo* review.

POINT I

THE RELEVANT FACTORS FOR JOINT EMPLOYMENT HAVE NOT BEEN DECIDED BY THIS COURT AND ARE A MATTER OF WIDESPREAD DEBATE BY THE CIRCUIT COURTS

A. *Rutherford* Did Not Address Joint Employment Under The FLSA

Respondents' Opposition Brief claims that this Court's decision in *Rutherford v. McComb*, 331 U.S. 722 (1947) has already decided the factors to be considered in determining joint employment under the FLSA. This argument is fallacious. *Rutherford* does not address joint employment but, rather, the standard for determining whether a worker is an employee or an independent contractor.

Throughout, *Rutherford* clearly was addressing the question of whether the workers were employees or independent contractors. In describing the proceedings in the District Court, *Rutherford* stated,

---

[3]In their argument, Respondents cite cases noting, generally, the FLSA's definition of employment is significantly broader than the common law definition. That caselaw, however, is irrelevant to the determination of this case because, as *Rutherford* noted, "there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford*, at 728.

"[t]he Administrator thought these facts brought the boners within the classification of *employees*, as that term is used in the Act. But the District Court thought that they were *independent contractors*..." *Id.*, at 727 (emphasis added). In defining the breadth[3] of the definition of employee in the FLSA, this Court held, "[w]here the work done, in its essence, follows the usual path of an *employee*, putting on an '*independent contractor*' label does not take the worker from the protection of the Act." *Id.*, at 729 (emphasis added). Finally, in reaching its conclusion, *Rutherford* was crystal clear as to the issue before it, holding,

> "[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical *independent contractor*. Upon the whole, we must conclude that these meat boners were *employees* of the slaughtering plant under the Fair Labor Standards Act."

Id, at 730 (emphasis added).

Courts consistently have held that different factors are relevant to determining joint employment versus choosing between employment and an independent contractor relationship. *See, e.g., Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006); *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998). *Even Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) *("Zheng II")*,

whose treatment of *Rutherford* forms the basis of Respondents' arguments, clearly delineates the distinction between these different legal questions. *Zheng II*, at 67-68, n.8.

Plainly, *Rutherford* addressed a different legal question than that raised in the Petition. Consequently, Respondents' argument that the Supreme Court already decided the issue is unavailing to deny granting a writ of *certiorari*. At best, Respondents have prematurely supported their case for affirming the Second Circuit's decision.

B. The Circuit Courts are Split on the Legal Standard To Be Applied in Determining Joint Employment and, Therefore, As To The Correct Decision in This Case

Contrary to Respondents' contention, there is a lively split between the circuits as to the proper standard for determining joint employment under the FLSA; and, consequently, whether Petitioners should be considered Respondents' joint employers. Respondents did not attempt to address the significant cases of various courts – spanning the full period from the decision in *Zheng II* to the present – which held that "[t]here is a split among the circuits as to the precise factors to consider in determining joint employment under the FLSA." *Dinkins v. Varsity Contractors*, 2005 U.S. Dist. LEXIS 6732, 23 (N.D. Ill. 2005); *See also Lepkowski v. Telatron Marketing Group*, 2011 U.S. Dist. LEXIS 9388 (W.D. Pa. 2011); *Morgan v. Speak Easy, LLC*, 625 F.Supp.2d 632, 649 (N.D. Ill. 2007);

Moldenhauer v. Tazewell-Pekin Consolidated Communications Center, 2006 U.S. Dist. LEXIS 93896 (N.D. Ill. 2006); *Zavala v. Wal-Mart Stores Inc.*, 393 F. Supp. 2d 295 (D. N.J. 2005).

Respondents' answer to these cases is a deafening silence. They do not cite, analyze, controvert or distinguish them. Instead, Respondents resort to misdirection and attempt to divert this Court from a circuit split which continues to exert a substantial impact on businesses and workers nationwide.

One such diversion is Respondents' contention that no circuit split exists as to the general standard to be applied because all the circuits' tests are based on the economic realities test and allow for consideration of extraordinary case-specific factors. As the various above-cited cases have held, there is a strong debate about the general factors to be considered in interpreting joint employment, and it is clear that this debate would affect the outcome of this case. This can be seen by the differing analysis in *Zheng v. Liberty Apparel*, 2002 U.S. Dist. LEXIS 4226 (S.D.N.Y. 2002) ("*Zheng I*") (using the four factor test from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)) and *Zheng v. Liberty Apparel*, 556 F. Supp. 2d 284 (S.D.N.Y. 2008) (using the six factor test from *Zheng II*).

Respondents claim that courts using the *Bonnette* test are consistent with the Second Circuit's six-factor test. This too is incorrect. Courts using the four-factor test have held that where only one or none of the four factors are present, joint employment

is not found as a matter of law. E.g. *Chao v. Diversified Transfer & Storage, Inc.*, 2008 U.S. Dist. LEXIS 5634 (D. Mont. 2008). (finding not joint employment because "none of the four factors identified by the Ninth Circuit as relevant to the issue of joint employment are present in this case."); *Muhammad v. Platt College*, 1995 U.S. App. LEXIS 1163 (8th Cir. 1995). Similarly, in *Zheng I*, the court found that none of the *Bonnette* factors favored Respondents and, therefore, Petitioners were not Respondents' joint employers. *Zheng I*, at 20-21.

In contrast, under the Second Circuit's current analysis, when none of the four factors are present, it does not lead to a ruling against joint employment, but merely means the court must shift to the six-factor test. *Zheng II, at 72; See also Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008). At both the trial and appellate level, Petitioners repeatedly requested the *Bonnette* factors be considered part of the test for joint employment to no avail.

Additionally, the tests used by the Fourth, Fifth and Eleventh circuits, discussed at length in the Petition and ignored by Respondents, conflict with the Second Circuit's opinion. For example, the Fourth Circuit would have explicitly considered the *Bonnette* factors, and, as understood by its district courts, would have granted summary judgment to Petitioners because the four factor test is unambiguously in their favor. *Jacobson v. Comcast*, 2010 U.S. Dist. LEXIS 102834, fn.4 (D. Md. 2010) (holding

that the Fourth Circuit test looks at *Zheng II's* factors when the result is not determined by the *Bonnette* factors). The Fifth and Eleventh Circuits tests likewise significantly conflict with the Second Circuit's test, as explained in the Petition. Petitioners also note that Respondents failed to address Petitioners' demonstration that the Second Circuit test is designed in a manner that will find any standard garment manufacturer to be a joint employer with his contractors' employees, whereas the other circuits use tests that will differ in result based on the individual facts in the case. Respondents instead "double-down" on their view that all garment manufacturers should be considered joint employers. (Op. p. 2-5.)[4] Petitioners and Respondents argued at the trial and appellate level over this issue, which is a critical component of the circuit split.

A second diversion Respondents use is to argue that no FLSA joint employment case involving the garment industry has occurred since *Zheng II* and, therefore, there is no circuit split. (Op. p. 10) This is irrelevant because the circuit split regarding the proper legal standard for joint employment under

---

[4]In arguing against a circuit split, Respondents repeatedly cite cases applying the Migrant and Agricultural Workers Protection Act, 29 U.S.C. §§ 1801 et seq. ("AWPA"). Many courts have held a different standard applies to these cases due to extensive administrative regulations mandating factors to be considered in determining employment under that law. *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997)

the FLSA exists in a myriad range of circumstances and economic relationships. Respondents cite no support for their strangely cramped definition of a circuit split, and this court frequently discusses circuit splits over legal standards in which the cases do not have identical facts. *Kasten v. Saint-Gobain Performance Plastics Corporation*, 563 U.S. ___ (2011) (deciding a circuit split where the conflicting FLSA cases involved a satellite television company, the Seattle Supersonics basketball team, a hospital and a chicken farm.) This Court has considered circuit splits regarding the definition of employment involving multiple industries. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (resolving a circuit split regarding the definition of employment in cases involving a magazine, software company, a company that sold statuettes and figurines and an advertising agency).

Respondents' argument is particularly peculiar as they do not discuss or even cite *Zhao v. Bebe Stores*, 247 F. Supp. 2d 1154 (C.D. Ca. 2003), which, as discussed in the Petition, held, in a factually identical situation, that a garment manufacturer was not the joint employer of his contractor's employees.

Similarly, Respondents' attempt to depict *Zheng II's* test as a specific test directed at the garment industry, and not a general test for joint employment, is clearly erroneous. (Op. p. 11, 16) The Second Circuit has used this test for determining joint employment of a nurse in a hospital and lower courts have applied it to other circumstances,

including workers at the U.S. Open tennis tournament. *Barfield*, supra; *Bogosian v. All Am. Concessions*, 2008 U.S. Dist. LEXIS 78625 (E.D.N.Y. 2008).

Additionally, the Opposition Brief does not address Petitioners' arguments that the Petition should be granted because it concerns an important federal issue which needs to be decided by this Court. Rather, Respondents help demonstrate its important effect on American workers by arguing that it would be more legitimate for American manufacturers to outsource to an underdeveloped country than to outsource within the American city that they are located. (Op. p. 3) Such a rule can only lead to the loss of American jobs, with devastating consequences for American workers at a time when they are already losing manufacturing jobs to foreign countries and are plagued by high unemployment.

Similarly, Respondents' use of AWPA cases demonstrates the importance of this case. Courts have accepted that Congress was trying to establish joint employment in nearly all AWPA cases. *Torres-Lopez, supra*, at 641. Applying such a definition to all FLSA cases would have a devastating effect on an American economy which relies heavily on outsourcing. *Zheng II*, at 73.

C. Respondents' Arguments Against *Certiorari* Rely on a Distortion of The Precise Question For Which Petitioners Seek *Certiorari*

Respondents' Opposition Brief argues the Petition should be denied because Petitioners did not argue at trial that only the *Bonnette* factors should be considered in determining joint employment. (Op. pp. 17-20) Similarly, while arguing that *Rutherford* controls this case, Respondents argued that the issue raised by the Petition is whether only the four *Bonnette* factors are relevant to joint employment. Respondents' argument blatantly mischaracterizes the issue raised by the Petition's first question, *to wit*, whether, under the facts present in this case, where all four *Bonnette* factors and three of the *Zheng II* factors weigh in Petitioners' favor, Petitioners are not Respondents' employer as a matter of law. As explained in the Petition, which of the various standards a Court should use to determine this question will weigh on the question, but Petitioners have never argued that only the four *Bonnette* factors can be relevant.

For example, Petitioners repeatedly have argued that the first *Zheng II* factor, whether they owned Respondents' place of employment or provided them with equipment, is an important factor weighing in their favor. Petitioners have argued both at trial and on appeal that, as explained in the Petition, specific *Zheng II* factors should either be interpreted in a manner consistent with other circuits or given less weight. Respondents neither objected to Petitioners' right to raise these arguments at the appellate level nor addressed them in their Opposition Brief.

Moreover, while Respondents are correct that

Petitioners submitted questions that included the six factors set out by *Zheng II*, they fail to note that Petitioners also submitted the four *Bonnette* factors and several other case specific factors. Petitioners raised these same issues in their appellate brief, and in the Petition. Thus, Respondents' arguments against the Petition's first question are dependent on distorting the question raised.

POINT II

RESPONDENTS' ARGUMENTS AGAINST THE PETITION'S SECOND QUESTION FAIL TO REBUT THE CIRCUIT SPLIT OF WHETHER THE ULTIMATE ISSUE OF JOINT EMPLOYMENT IS A LEGAL ISSUE TO BE DECIDED BY THE DISTRICT COURT AND SUBJECT TO *DE NOVO* REVIEW

As with their arguments refuted above, Respondents' main argument against the second question doesn't appear to be an argument against the existence of a circuit split, but, rather, an argument for affirming the Second Circuit's decision. They submit that this Court, in non-FLSA cases, has held the issue of employment is largely a factual issue and the Second Circuit's determination is supported by this precedent. This argument, while appropriate for a merits stage brief, does not address the standard for granting a writ of *certiorari* contained in Rule 10(a) of this Court's rules, which considers whether there is a circuit split, not which of the

conflicting circuits is correct.

Moreover, Respondents' argument makes the erroneous assumption that all statutes' definitions of employment should be considered in the same manner. This argument is foreclosed by this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992) which differentiated between statutes which do not define employment and are therefore governed by a common-law agency test, and the FLSA, which must be interpreted based on its statutory definitions. Statutory interpretation is an issue of law and should be determined by a judge and subject to *de novo* review. E.g. *United States v. Haas*, 623 F.3d 1214, 1218 (8th Cir. 2010) ("Our review requires statutory interpretation, an issue of law that we consider *de novo*").

Respondents' arguments that the Fifth and Tenth Circuits' cases cited in the Petition do not conflict with the Second Circuit's decision in *Zheng v. Liberty Apparel*, 617 F.3d 182 (2nd Cir. 2010) ("*Zheng IV*") are based on misreading the former cases. Respondents attempt to distinguish *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), by arguing that the Fifth Circuit reversed the lower court because the decision was clearly erroneous. While arguably a defensible reading of Judge Higginbotham's concurrence, it is not the view of the Fifth Circuit panel's opinion which declared "[t]his Court has repeatedly held that the ultimate conclusion that an individual is an 'employee' within the meaning of the FLSA is a legal determination

rather than a factual one." *Castillo*, at 185. *Castillo* then cited the Fifth Circuit's previous decision in *Donovan v. Tehco* (642 F.2d 141, 143 n 4 (5th Cir.1981), which held that "[i]n reviewing the district court's ultimate findings that the workers at issue were independent contractors, we are not constrained by the 'clearly erroneous' standard. Rather, these ultimate findings are treated as legal determinations." *Castillo*, at 186. *Castillo* then held, contrary to Respondents' arguments and the Second Circuit's view, that

> Although the above-mentioned cases were tried to the Court rather than to a jury, there is no basis to differentiate between a jury and a nonjury case regarding the status of an employee determination as legal or factual. The substantive provisions of the Act at issue -- violations of minimum wage, overtime, and record keeping provisions -- are the same in both jury and nonjury cases. If the employee/independent contractor determination is a legal one in a case tried to the court, it must also be a legal one in a case tried to a jury... A plaintiff's decision to exercise his right to a jury trial does not change the standard of review to be applied by this Court.

Castillo, at 186-87.

Similarly, Respondents' reading of *Johnson v. Unified Gov't of Wyandotte County/Kansas City*, 371 F.3d 723 (10th Cir. 2004) is precisely the opposite

of *Johnson's* holding. Respondents claim *Johnson* held that determination of employment under the FLSA should be reviewed for sufficiency of the evidence. *Johnson* actually held that a determination of employment was an issue of law ordinarily determined by the district court judge and reviewed *de novo* and only declined to overturn the district court's decision due to the doctrine of invited error. *Johnson*, at 729.

In citing *Bristol v. Bd. of County Commissioners*, 312 F.3d 1213 (10th Cir. 2002), Respondents again ignored *Darden's* holding discussed above, as *Bristol* involves interpretation of the ADA, not the FLSA.

CONCLUSION

For reasons cited in this brief and in the Petition, this Court should grant Petitioners' Petition for a writ of *certiorari*.

Respectfully Submitted,

Vano I. Haroutunian
(Counsel of Record)
Brett Nadler
Avraham Z. Cutler
BALLON STOLL BADER & NADLER, P.C.
729 Seventh Avenue, 17th Floor
New York, New York 10019
212-575-7900